ADMINISTRATIVE LAW

JULY 1955

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ADMINISTRATIVE LAW SECTION of AMERICAN BAR ASSOCATION

Editor: Bernard Schwartz
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PROGRAM OF ANNUAL MEETING
Philadelphia, Pennsylvania

The Warwick

Friday, August 19

10:00 A. M. Meeting of Council [1]
12:30 P. M. Luncheon Meeting of Council [1]
2:00 P. M. Meeting of Council

Saturday, August 20

10:00 A. M. Meeting of Council
12:30 P. M. Luncheon Meeting of Council
2:00 P. M. Meeting of Council

Sunday, August 21

10:00 A. M. Meeting of Council
12:30 P. M. Luncheon Meeting of Council
2:00 P. M. Meeting of Council

[1] Chairmen and Vice-Chairmen of Section Committees are invited to attend all meetings, including luncheons, of the Council. The general membership of the Section is invited to attend the meetings of the Council on Saturday, August 20, and part of Sunday, August 21, at which the Hoover Commission reports will be discussed. Meetings of the Council will be held in the Locust Room and luncheon meetings in the Green Room.

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Nothing contained herein shall be construed as the action of the American Bar Association unless the same shall have been first approved by the House of Delegates or the Board of Governors.

Monday, August 22
Mirror Room

2:00 P. M. General Session

Robert M. Benjamin, Chairman, presiding

Appointment of Nominating Committee

Report of the Chairman

Report of the Committee on Organization and By-laws, Louisa Wilson, *Chairman* [2]

[2] See page 245, *infra*.

Demonstration of a Board of Contract Appeals Case

Rufus G. Poole, Vice-Chairman, presiding

Panel Members:

Chairman: Robert Sheriffs Moss, Chairman, Section Committee on Public Contracts.

Counsel for the Contractor: John C. Hayes, General Counsel, Associated General Contractors; Bernard J. Gallagher, Vice-Chairman, Section Committee on Public Contracts.

Counsel for the Government: Gilbert A. Cuneo, Member, Armed Services Board of Contract Appeals, Department of Defense.

The Board: Theodore H. Haas, Chairman, Department of the Interior Board of Contract Appeals.

Report of the Committee on Public Contracts on proposed legislation [3]

Reports of other Committees [4]

[3] See page 247, *infra.*

[4] The reports of other committees to be considered at the Monday afternoon and Wednesday morning sessions will include those, printed in the following pages, proposing resolutions for adoption by the Section, i.e., reports of the Committees on Agriculture, Food, Drugs, and Related Subjects (Albert E. Stephan, *Chairman,* Jesse E. Baskette, *Vice-Chairman*), Communications (Arthur W. Scharfeld, *Chairman*), Immigration and Naturalization (Louis L. Jaffe, *Chairman,* Benjamin G. Habberton, Jack Wasserman, *Vice-Chairmen*), and Improvement of Administrative Procedures (Ralph F. Fuchs, *Chairman,* John C. Pirie, *Vice-Chairman*).

Tuesday, August 23

Warwick Room

8:00 A. M. Joint Breakfast Meeting with the Federal Bar Association

The Hoover Commission Reports on Legal Services and Procedure

Honorable Stanley N. Barnes, President, Federal Bar Association, and Robert M. Benjamin, Chairman of Section, jointly presiding

Addresses by:

Honorable Clarence A. Davis, Under Secretary of the Interior and Vice-President, Federal Bar Association

E. Blythe Stason, Dean, University of Michigan Law School, Member of Hoover Commission Task Force on Legal Services and Procedure, and Member of Council, Section of Administrative Law

Mirror Room

10:30 A. M. General Session

Robert M. Benjamin, Chairman, presiding

Discussion of, and Section action with respect to, the recommendations of the Hoover Commission and its Task Force on Legal Services and Procedure and related recommendations of the President's Conference on Administrative Procedure.

The discussion will be led by the Chairmen of Section Committees on Particular Legislation or Proposals, *i.e.,* the committees on Administrative Practi-

tioners, Administrative Procedure Act, Good Faith Reliance Act, Hearing Examiners, Improvement of Administrative Procedures, and Judicial Review, and Chairmen of Committees on Particular Federal Agencies will discuss the effect of the recommendations on the procedures of their respective agencies.

2.00 P. M. General Session

Continuation of the morning program

Wednesday, August 24

Mirror Room

10:00 A. M. General Session

Discussion of pending legislation, Donald C. Beelar, *Chairman,* National Committee

Reports of other Committees.[4]

Report of Nominating Committee and election of Officers and Council Members

CHAIRMAN'S PAGE

In accordance with custom this issue of the Bulletin is made up of the program of the annual meeting and reports of various Section committees.

As I mentioned in the last issue, the Hoover Commission reports on Legal Services and Procedure have been assigned to the various committees of the Section for intensive study of matters falling within their particular fields of special interest. Reports resulting from such study are expected before the annual meeting; the shortness of time available has prevented their submission in time for printing here. Some of the reports printed here deal with these matters, but only in a preliminary way. We shall thus, in coming to conclusions at the annual meeting, have to rely largely on oral presentation.

I call attention again to the invitation printed in the last issue to submit comments on the Hoover Commission reports through Donald C. Beelar, Chairman of the National Committee, and to attend the meetings of the Council at which the reports will be considered (with prompt notice to Miss Collins, Secretary, of your intention to attend).

Robert M. Benjamin
Chairman

COMMITTEE ON ADMINISTRATIVE PRACTITIONERS

1. Legal Representation before Administrative Agencies; The Administrative Practitioners and Ethics Bill

A. *In General:* The minutes of the Council meeting in February do not accurately reflect the provisions of the Administrative Practitioners and Ethics Bill or the previous work of this Committee.

This Committee has devoted the bulk of its work since 1947 to the subject of legal representation before administrative agencies. Over the years, as a result of our work, a form of legislation proposed to deal comprehensively with the subject, known generally as the Administrative

Practitioners Bill, has evolved. While some new provisions have been added to the Bill during this period and there have been changes in draftsmanship, its basic approach has always been, and is now, one of endeavoring to deal with the subject of legal representation before administrative agencies in fully comprehensive form, rather than fragmentarily in bits and pieces. During the last few years drafts of the Bill have been repeatedly circulated among Committee members and the officers, Council members and other committee officers of the Section, containing minor changes in draftsmanship, and asking for comments. Also, the Bill was specifically approved, in substantially its present form, at the Midwinter Meeting of the Council of the Section in Chicago in February 1953. Thereafter, meetings with an opposition group, the accountants, were held throughout the winter of 1953-1954. In an endeavor to meet their objections, the Bill was thoroughly reviewed in the spring of 1954 by members of this Committee with the members of the Standing Committee on Unauthorized Practice of Law, and several minor changes were made. The resulting draft was labeled "Third Draft." A copy of the Third Draft was attached to the Report of this Committee for 1954, but through some error was not printed with the Report of this Committee for 1954 in the Bulletin. At the Annual Meeting of the Section in Chicago in 1954, however, copies of the Third Draft were distributed to all Section members present, the new changes and additions explained, and comments were invited. One change was suggested at that meeting to the effect that the Bill should be made applicable to agency proceedings subject to sections 7 and 8 of the Administrative Procedure Act, rather than to those subject to section 5. This change was incorporated in a further draft labeled "Fourth Draft" which was circulated generally on February 8, 1955, with a statement in support of it, and a memorandum from the Chairman stating that "only a few changes have been made from the Third Draft—and both this and the Third Draft represent a composite of the views of everyone interested insofar as I have been able to obtain them." A copy of the Fourth Draft is appended hereto.

The title of the Third and Fourth drafts was expanded to that of "Administrative Practitioners and Ethics Act." In its endeavor to grapple comprehensively, rather than fragmentarily, with the variety of problems involved in representation before administrative agencies, the Third and Fourth drafts contain provisions which would impose standards of ethics in administrative practice; prohibit the practice of law by non-lawyers before administrative agencies; simplify the mechanics for the admission of attorneys-at-law to practice before all agencies; provide for the recognition by agencies of lawyers who file notices of appearance; and provide for the discipline of administrative practitioners, in appropriate cases, by an Administrative Practitioners Council; and provide for the disciplining by federal courts of lawyers by reason of conduct occurring in an agency proceeding.

However, the minutes of the Midwinter Meeting of the Council on February 19-20,

1955, contain the following excerpt relating to this Committee:

"3. *Problems of Administrative Practitioners*

"(a) John Cragun reported briefly concerning his work as a member of the Association Committee on Professional Relations. The principal object of the Committee's efforts, he said, was to reach some workable understanding with the American Institute of Accountants. He anticipated that the Committee's report would not deal with a Practitioners Act.

"It was necessary for John Cragun to be absent from the Council meeting for the remainder of Saturday, attending the Professional Relations Committee meetings. In his report to the Council on Sunday, he developed fully the history of the friction between the Accountants and the Association and pointed out that the Committee had been given broad powers from the House of Delegates to deal with the problem pursuant to the Statement of Principles adopted by the Association and the American Institute of Accountants in 1951. Moreover, the Board of Governors has given unanimous approval to the Committee's position in relation to the Accountants' position.

"(b) Following John Cragun's examination of the accountant problem on Sunday, the Council turned attention to the practitioner proposals developed by Trowbridge vom Baur's committee. There was some feeling that the current proposal is limited in its application, since it is aimed principally at participation in the formal hearing of a case. Don Beelar requested support of the Council for a plan to develop a code which would affect all practitioners before the Federal agencies. Such a code would be submitted to the agencies and left to them to adopt voluntarily. There is a fair chance that a number of agencies would subscribe to a fair code, and later activity could be directed to persuading others to follow suit in due course.

"Don Beelar's proposal developed two lines of thought: (1) the idea has real possibilities and, as a means of determining its merit, views on it should be submitted for the comment of the Association's Committees on Professional Relations and Unauthorized Practice, and the Section Council and Committee on Administrative Practitioners; (2) the vom Baur bill should not be circulated until sentiment on the Beelar proposal has become conclusive, in order not to 'muddy the waters', nor submitted to the Congress, lest the Section be caught in an inconsistent position if hearings were scheduled and Section representatives called upon to testify.

"(c) A resolution to change the name of the Section's Committee from Committee on Administrative Practitioners, Admission and Ethics to simply *Administrative Practitioners* was approved and referred to the Committee on Constitution and By-Laws.

"(d) A resolution was carried and referred to the Committee on Administrative Practitioners that an attempt be made to have legislation enacted which would require Federal agencies to recognize as practitioners before the agencies all law-

yers admitted to the highest court of their States and in good standing, and which would also provide means, now lacking, for controlling improper practice by lawyers before agencies.

"Not included in the resolution, but as a suggestion, it was urged that the idea of enrollment by the agencies be included in the proposal, so that lawyers would register, thus establishing a record against which admissions could be checked.

"(e) Action on the August resolution regarding limitations on attorneys' fees was deferred, on the ground that the proper time had not yet arrived for presentation of this matter to the House of Delegates."

In stating that the Administrative Practitioners and Ethics Act "is limited in its application, since it is aimed principally at participation in the formal hearing of a case," the minutes of that meeting do not accurately describe any draft of an Administrative Practitioners Act which has ever been approved by this Committee. And with regard to the approval by the Council of Don Beelar's request for support of a "plan to develop a code which would affect all practitioners before the Federal agencies," the members of this Committee are completely mystified, inasmuch as the proposed Administrative Practitioners and Ethics Act would most certainly affect all practitioners before the Federal agencies. However, the Council has instructed that views regarding Mr. Beelar's plan be submitted to this Committee and others, and that "until sentiment on the Beelar proposal has become conclusive" this Committee should take no further steps with the Administrative Practitioners and Ethics Bill. Since the "code which would affect all practitioners before the Federal agencies", to be developed by Mr. Beelar, has not been submitted to this Committee, the work of this Committee on the Administrative Practitioners and Ethics Bill has been in a state of suspense since the Midwinter Meeting.

B. *Admitting Lawyers to Administrative Practice: Section (d) of the Minutes*: Section (d) of the minutes of the Midwinter Meeting of the Council, above quoted, refer a resolution to this Committee "that an attempt be made to have legislation enacted which would require Federal agencies to recognize as practitioners before the agencies all lawyers admitted to the highest court of their States and in good standing, and which would also provide means, now lacking, for controlling improper practice by lawyers before agencies." We are opposed to this proposal for the following reasons, (1) it is contrary to the basic philosophy which this Committee has had virtually since its inception, that the subject should be treated comprehensively rather than piecemeal; (2) it is inconsistent with the "plan to develop a code which would affect all practitioners before the Federal agencies" described in paragraph (b) of the minutes; and (3) now that the Report of the Hoover Commission has been issued and the bill proposed by its Task Force dealing with this subject has already been introduced into Congress as Sections 600-604 of H.R. 6114, the years of work which have been done on this subject

have reached the point where comprehensive legislation is possible in practical terms.

C. *Agency Registers of Attorneys*: Paragraph (d) of the minutes also suggests that "the idea of enrollment by the agencies" be also made the subject of piecemeal legislation. We are opposed to this suggestion for all the reasons stated in B above, plus the reason that administrative agencies are now empowered to maintain a register of lawyer practitioners before them. Some thirteen, including the Interstate Commerce Commission, presently maintain registers of practitioners. There is no need for legislation on this point.

2. The Hoover Commission Report

The Report of the Hoover Commission on Legal Services and Procedure contains recommendations on the subject of legal representation before administrative agencies which reflect the development work done over the years, and which closely parallel the positions taken, by this Committee. In addition, the Administrative Code proposed by the Hoover Commission Task Force contains legislative provisions which, in theory and approach, closely resemble the theory and approach of the Administrative Practitioners and Ethics Bill and the convictions of this Committee. But in view of the instructions of the Council not to proceed further with the Administrative Practitioners and Ethics Bill pending the development of the described "code which would affect all practitioners before the Federal agencies," this Committee felt that it must not circulate comment on the Report of the Hoover Commission, or it would be attempting to do indirectly what it has been forbidden to do directly. The Chairman of the Committee so reported to the Council at its meeting in Washington on May 21-22, 1955, and thereafter, the following resolution was passed by the Council:

> "RESOLVED, That the Committee on Administrative Practitioners will come to the Annual Meeting in Philadelphia, prepared to present a developed position with respect to the Hoover Commission recommendation on legal representation, for the Council and the Section; and
>
> "FURTHER RESOLVED, That the Committee shall take into consideration views from other sources."

As a result, this Committee will prepare and issue a Supplemental Report dealing with the recommendations of the Hoover Commission, in time for the Annual Meeting in August.

3. Changes in the Requirements of the Interstate Commerce Commission for Admission to Practice of Non-Lawyers before that Body

Section 17(3) of the Interstate Commerce Act provides that a party to a Commission proceeding may "appear . . . in person or by attorney." The Commission has consistently construed this provision to include attorneys-in-fact as well as attorneys-at-law, and thus has permitted appearances by non-lawyers. Indeed, in the first formal proceeding before the Com-

mission presided over by Judge Thomas M. Cooley, a steamboat captain appeared for a municipal group and no question was raised. And for many years following its creation in 1887, the Interstate Commerce Commission placed no formal restrictions upon the supposed right of anyone, whether an attorney-at-law or not, to appear before it and to assume to represent a party to a Commission proceeding. However, the period following the termination of Federal control after World War I brought abuses on the part of "unequipped and unfit persons" who appeared to represent parties to Commission proceedings.* Then *Goldsmith* v. *Board of Tax Appeals,* 270 U. S. 117, was decided on March 1, 1926. That case clearly recognized the power of an administrative agency, in promulgating procedural rules and regulations dealing with its procedure, to make proper rules governing the admission of persons to practice before it, and in 1927 the Commission added an amendment to Rule II of its Rules of Practice, requiring all persons appearing before the Commission in a representative capacity to "conform to the standards of ethical conduct required of practitioners before the Courts of the United States." Following this trend of raising the standards of conduct of non-lawyer practitioners, a little later the Commission took the somewhat unusual step of creating a "bar" of non-lawyer practitioners before it. This organization, the Association of Practitioners Before the Interstate Commerce Commission, came into being on September 1, 1929. Then the Annual Report of the Interstate Commerce Commission to Congress for 1938 stated that "Experience has shown that it has become desirable to subject the non-lawyer applicants to examinations as to their qualifications," and in 1939 the Commission began to conduct written examinations for non-lawyers, which had the effect of raising the standards of admission for practice and of reducing the admission of non-lawyer practitioners by about 90%.

During the last year the Commission has commendably continued this trend of raising the standards of admission for non-lawyer practitioners. On December 1, 1954, the Commission gave notice, implemented by a Supplemental Notice of February 1, 1955, that, effective May 1, 1955, an additional standard would be required of non-lawyers seeking to be admitted to practice. This "Qualification Standard" requires several things, (1) a minimum of two years of college, plus (2) "technical education, training or experience which is regarded by the Commission as the equivalent of two additional years of college education in equipping the applicant for practice before the Commission", plus (3) the examination. In exceptional cases where study and training are shown to be the equivalent of the foregoing standards, an applicant may be admitted by special order of the Commission. An applicant's statement of his college education must be supported by a transcript of his college record, and the phrase "a minimum of two years of college" means "the receipt of either 60 semester credits or approximately 1,000

* See the Appendix "Practitioners Before the Commission" attached to the Monograph dealing with the Commission of the Attorney General's Committee on Administrative Procedure, p. 99.

scheduled class hours or periods for the successful completion of courses of study, whether taken in residence or not."

This action of the Interstate Commerce Commission is a step in the right direction. However, if we are to follow the basic viewpoint of this Committee and of the Standing Committee on Unauthorized Practice, non-lawyers are not qualified to engage in the practice of law because it happens to take place before an administrative agency; and serving as trial counsel in an adversary proceeding before the I. C. C. appears to us to consist, in the most vivid sense, of the practice of law. In practical terms, however, the problem of restricting the practice of law before the Interstate Commerce Commission to persons with legal training must probably await legislation such as the Administrative Practitioners and Ethics Act or that proposed by the Hoover Commission.

4. Pending Legislation

A. *Bills relating to Portions of the Problem which the Administrative Practitioners Bill Would Dispose of Comprehensively*: We oppose the bills listed below, not because the objective of each one is undesirable, but because they would deal piecemeal with different aspects of the subject of administrative practice which the Administrative Practitioners and Ethics Bill would deal with comprehensively:

H. R. 151 introduced by Congressman Multer on January 5, 1955. This Bill provides that no one shall engage in the practice of law in the District of Columbia unless he shall first have been admitted to practice before a state or Federal court. Excepted from the Bill is "the practice of law before any administrative agency (including the Tax Court)." This bill should be opposed because it contains no provision for the supervision or discipline, within the District of Columbia, of members of the bar of other states, etc., who are to be permitted to practice in the District of Columbia without being admitted to the District of Columbia Bar.

H. R. 778 introduced by Congressman Keating on January 5, 1955. This bill provides that each member of the bar of the highest court of a state or of a Federal court shall be eligible to practice before all administrative agencies. Again, this bill does not provide for supervision or discipline of lawyers engaged in administrative practice.

H. R. 1601 introduced by Congressman Reed of New York on January 6, 1955,* and *H. R. 2416* introduced by Congressman Lipscomb on January 17, 1955. These bills are identical and would authorize the Secretary of the Treasury to prescribe regulations relating to qualifications of persons who assist taxpayers in the determination of their Federal tax liabilities, and for other purposes. These bills should be vigorously opposed. They provide that no person shall be denied the right to en-

* H.R. 1601 is the same as H.R. 9922, 83d Congress. At the 1954 annual meeting the House of Delegates, on motion of the Sections of Taxation and Administrative Law and the Standing Committee on Unauthorized Practice of the Law, adopted resolutions opposing the enactment of H.R. 9922 (40 A.B.A.J. 906).

gage in practice before the Treasury Department "solely because he is not a member of any particular profession or calling." The bills would, in effect, authorize non-lawyers to practice law in the tax field. The Administrative Practitioners and Ethics Bill, however, would prohibit the practice of law before administrative agencies.

B. *Miscellaneous*:

H. R. 769 introduced by Congressman Jenkins on January 5, 1955, to provide that the Declaration of Attorney or Agent executed by a person who prepared an estate tax return need not state that it is executed under penalties of perjury and need not imply any expression of opinion as to the value of items listed in the return. This appears to be a desirable bill.

H.R. 795 introduced by Congressman Keating on January 5, 1955, to require persons who obtain commissions for rendering assistance in the obtaining of Government contracts to register with the Congress. This bill appears to be similar to the Federal Anti-Lobbying Act. It provides that any person who shall engage himself for pay or other consideration, to seek in a representative capacity to obtain a contract in excess of $25,000 with any department or agency in the Executive Branch of the Government shall, before doing anything in furtherance of such object, register with the Clerk of the House and Secretary of the Senate, giving certain information. Provision is also made for the filing of quarterly reports. The bill would apparently not apply to persons whose seeking of a Government contract is merely incidental to his employment, "for which employment he receives compensation at stated intervals and of a fixed amount, or to any bona fide established commercial or selling agency maintained solely by" such individual or his employer. All reports are to be published. We do not see any present need for this type of legislation. It would discriminate in favor of big companies as against small business.

H.R. 1622 introduced by Congressman Teague of Texas on January 6, 1955, to provide for the payment in a lump sum direct to counsel of a reasonable attorney's fee in a suit brought by or on behalf of an insured during his lifetime for waiver of premiums on account of total disability. It would provide for amendment to Sec. 617 of the National Life Insurance Act of 1940 by insertion of a provision to the effect that when suits are brought by a representative of an insured for waiver of premiums on account of total disability, the Court as part of the judgment or decree shall determine and allow a reasonable attorney's fee to be paid in a lump sum direct to counsel, such fee to be paid by the veteran in an unsuccessful action and by the Government where the judgment is entered in the veteran's behalf. The provisions of this bill are desirable.

S. 491 introduced by Senator Eastland on January 18, 1955, to provide for attorneys' liens in proceedings before the courts or other departments and agencies of the United States. This bill would provide, similarly to the statutes in many states, for the attaching of an attorney's

lien in favor of "an attorney-at-law whose appearance has been entered for a party," in any judicial action or administrative proceeding. This bill is comparable to many state statutes providing for attorneys' liens generally, and is highly desirable.

H.R. 828 introduced by Congressman Multer on January 5, 1955, to amend Title 28 of the United States Code with respect to the eligibility of members of the bar of the United States Supreme Court to practice before all courts of appeals and district courts of the United States. We doubt that the bill comes within the jurisdiction of the Section.

H.R. 3460 introduced by Congressman Priest on February 2, 1955. This bill would amend Section 20 of the Trading with the Enemy Act, relating to fees of agents, attorneys, and representatives. Aside from routine changes to reflect the transfer of functions to the Office of Alien Property in the Department of Justice, this bill would eliminate the test of "fair compensation" in fixing fees for legal services rendered before that Office. Under present Section 20, fees for services must not exceed "fair compensation" therefor and must also not exceed ten percent of the value of the property. But under the present bill, no criterion would be laid down for fixing the amount of fees for services rendered except that they should not exceed ten percent. To this extent, we believe the bill should be opposed. It wholly overlooks the factors of (1) skill and proficiency and (2) volume of work in the rendering of legal services, and tends to put all legal services on a par, whether good, bad, or indifferent, and whether a thousand hours or only ten hours of legal work are involved. Under this bill the tendency would probably be for lawyers to claim, and the Office of Alien Property to allow, ten percent for services rendered, regardless of how much legal work was involved or of its quality. We feel that this is wrong. A client can only be adequately protected if his lawyer is adequately compensated for his skill and volume of work. To penalize the lawyer necessarily means penalty to the client also, and to discourage the adequate presentation of claims. In addition, as stated in our report last year, we are opposed to arbitrary percentage limitations on legal fees, inasmuch as they do not bear any necessary relationship to either quantity or quality of work performed, and necessarily result in arbitrary limitations on the presentation of clients' cases.

5. Summary for the Year

One of the basic conclusions developed by the Committee is that the practice of law is just as much the practice of law if it happens to take place before an administrative agency as when it takes place before a court or in an office. Accordingly, non-lawyers do not appear to be any better qualified to practice law before administrative agencies than anywhere else. Fortunately, the controversy of the past few years has resulted in an increased education of both the public and the bar on this subject, and a better recognition of the viewpoint expressed above. The subject has now re-

ceived enough attention to have resulted in the appointment of a Committee on Professional Relations under the Chairmanship of William J. Jameson, a former President of the Association, and with John W. Cragun, last retiring Chairman of the Section of Administrative Law, among its members. That Committee has negotiated extensively with the accountants over this basic principle, and the Report of the Hoover Commission on Legal Services and Procedure, which will be the subject of a Supplemental Report of this Committee before the Annual Meeting, also upholds it. Legislation implementing it, H. R. 6114, has been introduced into Congress. Thus the work that this Committee has done over the years appears to be moving to a conclusion.

June 8, 1955.

Respectfully submitted,

COMMITTEE ON ADMINISTRATIVE PRACTITIONERS

F. TROWBRIDGE VOM BAUR
Chairman

RICHARD S. DOYLE
Vice-Chairman

APPENDIX

Administrative Practitioners and Ethics Act (Fourth Draft)

A BILL

To protect the public from violations of ethics, influence peddling, incompetence, and solicitation in connection with the representation of persons before administrative agencies of the United States; to regulate admission to practice of qualified persons before such agencies; and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE

Section 1. This Act may be cited as the "Administrative Practitioners and Ethics Act".

DEFINITIONS

Section 2. Terms shall have the same meaning as in the Administrative Procedure Act (Public Law 404, Seventy-ninth Congress). "Section 7 or 8 proceeding" means an agency proceeding subject to Section 7 or 8 of the Administrative Procedure Act. "Council" means the Administrative Practitioners Council established by Section 5 hereof.

ETHICS IN ADMINISTRATIVE PRACTICE

Section 3. Every individual who represents another person in the practice of law before an agency shall be governed by the ethical standards of the legal profession to the extent that they may be applicable thereto. The members and hearing officers of every agency which conducts Section 7 or 8 proceedings shall be governed by the standards of judicial ethics to the extent that they may be applicable thereto.

UNAUTHORIZED PRACTICE PROHIBITED

Section 4. A. No person, except an attorney-at-law who has received credentials as

provided in Section 5 hereof or as permitted thereunder, shall appear for or represent a party before any agency in a Section 7 or 8 proceeding; *provided, however,* that any agency may, in its discretion, permit an individual who is not an attorney-at-law but who appeared for or represented parties in Section 7 or 8 proceedings before such agency prior to the passage of this Act, to continue to appear for or to represent parties in Section 7 or 8 proceedings before such agency. Individuals who are not attorneys-at-law may represent parties before an agency in proceedings other than Section 7 or 8 proceedings to the extent permitted, and upon such terms and conditions as may be required, by the agency; and *provided further,* that any agency may, in its discretion, permit civic and charitable organizations, acting through employees who are or are not attorneys-at-law, to appear for or to represent, without compensation, parties to Section 7 or 8 and other proceedings.

B. Nothing in this Act shall be construed so as to permit persons who are not attorneys-at-law to engage in the practice of law before an agency.

Credentials of Attorneys-at-Law

Section 5. A. *Persons Entitled:* Any individual shall be entitled to credentials upon proof that he is a member in good standing of the bar of the highest court of any state, territory or possession of the United States, or of the District of Columbia. Possession of credentials under this section shall entitle the holder thereof to appear for and to represent other persons in any and all proceedings before any agency, except that any agency which pursuant to statute has for more than seven years prior to the adoption of this Act required attorneys-at-law to demonstrate additional special technical competence may continue to do so under reasonable rules and regulations, and no credentials authorizing practice before such agency shall be issued until such agency shall have certified that the applicant has met such requirements. Any agency may, in its discretion, permit an attorney-at-law without credentials to appear for or to represent other persons in a particular agency proceeding.

B. *Issuance of Credentials:* There is hereby established an Administrative Practitioners Council of five members. Each member shall be an attorney-at-law eligible for credentials hereunder, shall be designated by the Attorney General, and shall serve without compensation. At least two members shall be persons who are engaged in the private practice of law. Three members shall constitute a quorum. The Council may appoint a secretary and other officers, provide for such other assistance or advisory services or committees as may be required, issue and revoke credentials as provided herein, incur and pay obligations, including the reasonable travel and other expenses of the members and staff of the Council, promulgate rules and regulations, establish its own procedure as may be necessary to effectuate the policies of this Act, fix reasonable fees for the issuance of credentials, require the submission of relevant information from any person or agency, and shall maintain a register of attorneys-

at-law holding credentials under this section. The Council shall not refuse to issue credentials to any applicant therefor except after opportunity for hearing and upon the record thereof.

C. *Recognition by Agencies:* Each agency shall recognize, and communicate and deal directly with, an attorney-at-law holding credentials who has filed a written notice of appearance for another person, with respect to those matters concerning which such written notice of appearance states that he represents such other person; no agency shall place restrictions on the right of a person to legal representation before it, nor shall any agency represent that a person does not need legal representation in proceedings before it which involve the application of legal principles.

D. *Revocation of Credentials:* The Council may, upon its own initiative or the petition of any agency, bar association, group, or individual, determine, after opportunity for hearing and upon the record thereof, whether credentials shall be revoked as having been fraudulently obtained or erroneously issued, or whether credentials issued to any individual shall be revoked or suspended or whether he shall be censured for conduct incompatible with the standards of the legal profession. Any order revoking or suspending the credentials of or censuring an individual shall not be released for publication by the Council or an agency until the time for seeking judicial review thereof shall have expired, or if judicial review thereof is sought, until after the final disposition thereof.

E. *Judicial Review:* Any person affected by an order made pursuant to this section may obtain a review of such order in the Court of Appeals of the United States within the circuit (1) of his residence, (2) where he maintains an office for the practice of law, (3) where the acts complained of are alleged to have taken place, or (4) in the circuit for the District of Columbia, by filing in such Court and serving upon the Council at its principal office, either personally or by registered mail, within ninety days after receipt of such order, a written petition praying that such order be set aside. Upon receipt of the petition, the Council shall promptly certify and file in the Court a transcript of the entire record in the proceeding, including all the evidence taken and the report and order of the Council. Upon such filing of the petition and transcript the Court shall have exclusive jurisdiction of the proceeding, shall consider the issues of fact and law therein de novo, and shall render such decree as may be appropriate hereunder. If either party shall apply to the Court for leave to adduce additional evidence, and shall show to the satisfaction of the Court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence before the Council, the Court may order such additional evidence to be taken, before the Council or otherwise, and upon such terms and conditions as it may deem appropriate. If such new evidence is taken before the Council, it may modify its previous finding or make new findings, and shall thereupon file in the Court any new or modified findings and its recommendations, if any,

for the modification or setting aside of its original order, together with such additional evidence. The judgment and decree of the Court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari as provided in Section 1254 of Title 28 of the United States Code.

F. *Receipts:* Receipts of the Council shall be deposited in the Treasury of the United States as a trust fund to be drawn upon for the purposes of this section as the Council may direct; and there is hereby appropriated to such fund for such purposes for the fiscal year in which this Act is approved, and for each fiscal year thereafter, the unexpended balance in such fund at any time. There are hereby authorized to be appropriated such additional funds as the Congress may determine necessary for the administration and functioning of the Council.

Practice by Agents Other Than Attorneys-at-Law

Section 6. A. *Credentials for Practice by Agents Not to Be Issued:* Credentials shall not be issued by the Council to individuals other than attorneys-at-law, but any agency permitting individuals other than attorneys-at-law to appear for or represent others in proceedings before it as provided in Section 4 hereof, may, in its discretion, issue cards or other documents evidencing such authority. An individual who appears for or represents others in proceedings before an agency pursuant to this section may appropriately use, in connection with his own name in practice before such agency, the name of a partnership of which such individual is a member.

B. *Revocation of Right to Practice:* The Council may, upon its own initiative or the petition of any agency, bar association, group, or individual, determine, after hearing, whether the right of any individual who is not an attorney-at-law to appear for or to represent others before an agency shall be revoked or suspended, or whether he shall be censured, for violation of this Act or for dishonest or other conduct incompatible with the fiduciary nature of his relationship with the person or persons represented. Any order of censure or suspending or revoking the right to practice before an agency made pursuant to this paragraph shall be subject to judicial review as provided in Section 5 hereof and shall not be released for publication except as provided in Section 5 hereof.

Agency Disciplinary Proceedings

Section 7. A. *Attorneys-at-Law:* Any agency may by rule or regulation provide (1) that for good cause shown any attorney-at-law may be (a) censured, (b) suspended from acting in a representative capacity in a particular case, or (c) prohibited from thereafter acting in a representative capacity before such agency; or (2) that the matter of any attorney-at-law's conduct may be referred to State or Federal judicial disciplinary authority, to any bar association, or to the Council, with recommendations for investigation or disciplinary action. Any agency order made pursuant to subdivision (1) of this paragraph shall be entered only after oppor-

tunity for hearing and upon the record thereof, shall be subject to judicial review as provided in Section 5 hereof for review of orders of the Council, and shall not be released for publication except as provided in Section 5 hereof for orders of the Council.

B. *Persons Other Than Attorneys-at-Law:* Any agency may by rule or regulation provide that, for good cause shown, any person not an attorney-at-law may be (1) censured, (2) suspended from acting in a representative capacity in a particular case, or (3) prohibited from thereafter acting in a representative capacity before such agency. Any agency order made pursuant to this paragraph shall be entered only after opportunity for hearing and upon the record thereof, shall be subject to judicial review as provided in Section 5 hereof for review of orders of the Council, and shall not be released for publication except as provided in Section 5 hereof for orders of the Council.

Jurisdiction of Federal Courts

Section 8. Each district court shall have original jurisdiction of any civil action or proceeding brought by the Council, an agency, bar association, or other interested party to disbar, censure or suspend from practice in such court any attorney-at-law who is admitted to practice before such court, for conduct occurring in connection with an agency proceeding which is incompatible with the ethical standards of the legal profession.

Operation and Effect

Section 9. A. *Penalties:* Any person wilfully violating Section 4 of this Act or knowingly submitting any false information required pursuant to this Act, shall be fined not more than $5,000, or imprisoned for not more than one year, or both.

B. *Scope of Act:* All statutory provisions and rules in conflict with this Act are hereby repealed.

COMMITTEE ON AGRICULTURE, FOOD, DRUGS, AND RELATED SUBJECTS

During the year 1954-1955, the Committee on Agriculture, Food, Drugs, and Related Subjects consisted of 32 members. It submits the following report of its activities:

1. Legislation

The Committee considered the following bills referred to it by the National Committee:

(a) *H.R. 252—84th Congress—First Session.*—This bill would provide, in effect, that, whenever certain standards for foods are authorized by the laws or regulations of the United States Government, the Secretary of Agriculture must prescribe like standards and requirements for similar products imported into the United States from foreign countries. Upon consideration, the Committee decided that this bill presents a substantive question and should be considered by some other group within the American Bar Association.

(b) *H.R. 3240—84th Congress—First Session.*—The purpose of this bill is to permit the Secretary of Agriculture to make payments to producers of wheat under the Soil Conservation and Domestic Allotment Act (the so-called ACP payments) who exceed their acreage allotments. While H.R. 3240 is of considerable importance from a substantive point of view, the Committee felt that it presents no question of particular importance in so far as administrative procedure is concerned, and so notified the Chairman of the National Committee.

(c) *H.R. 4099, H.R. 4100, and H.R. 5927, 84th Congress—First Session.*—The purpose of these three measures is to amend certain of the substantive and procedural provisions of the Food, Drug, and Cosmetic Act of 1938, as amended. A special sub-committee was designated to consider these bills, and the initial reaction of the sub-committee has been that the proposed legislation is objectionable on procedural grounds. It is the view of the Committee that these measures should be the subject of further study, particularly in the light of the recommendations of the Hoover Commission.

(d) *S. 930—84th Congress—First Session.*—This measure would establish, within the Department of Agriculture, a Federal Dairy Stabilization Board, which would be authorized to stabilize the price of dairy products in this country. The Committee feels that this bill presents some serious questions in the field of administrative procedure, and should be opposed. Accordingly, the Committee recommends the adoption of the following resolution:

RESOLUTION

RESOLVED, That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

"Be it Resolved, That it is the opinion of the American Bar Association that the procedural provisions of S. 930, 84th Congress, First Session, are contrary to generally accepted concepts of sound federal administrative procedure, including the criteria of the Administrative Procedure Act, and that the Section of Administrative Law be authorized and directed to take such action as may be necessary to bring this matter to the attention of the Congress."

REASONS

(1) S. 930 would confer upon the Federal Dairy Stabilization Board authority to exercise rule-making power by announcing, annually, stabilization prices and, in this connection, the Board would be authorized, but not required, to hold hearings in connection with the formulation of such stabilization prices. Once stabilization prices are announced, the Board would be prohibited from changing the stabilization prices, during any given year, without a hearing. Such procedure would appear to be anomalous in that no hearing is required in connection with the formulation of a price but a hearing is required in any amendment of that price. Since the Board would not be authorized to fix the price up-

on the basis of a hearing specifically required by statute upon a public record, the informal rule-making procedure of Section 4(a) of the Administrative Procedure Act would seem to apply to this type of proceeding were it not for the ambiguous reference to the fact that the Board "may" hold hearings in connection with the formulation of prices. It appears clear that the persons drafting this measure have not taken into consideration the provisions of the Administrative Procedure Act and other generally accepted criteria of sound administrative procedure in connection with the exercise of delegated rule-making authority.

(2) Even more weird than the foregoing are the provisions dealing with the relationship between the Secretary of Agriculture and the Board. If the Secretary determines that stabilization prices announced by the Board are unreasonably high, he may hold hearings to prescribe a stabilization price which he thinks is sound. If, thereafter, the Board fails to comply with the Secretary's determination, the Secretary may petition the United States Court of Appeals for the District of Columbia Circuit for a decree directing the members of the Board to take action, or to cease and desist from the taking of action, as the case may be. The court is given jurisdiction to affirm, modify, or set aside the order of the Secretary, or to enter such other decree as the court may deem equitable. The bill also provides that the Board may, itself, initiate like court action to test the validity of a Secretarial determination. Such a procedure appears potentially unsound from several standpoints. The bill would seem to confer undesirable administrative powers upon the United States Court of Appeals for the District of Columbia Circuit. Although, because of the peculiar nature of the jurisdiction of this court, the vesting of such duties on that tribunal perhaps would be constitutionally permissible, it would be inadvisable to burden such a busy court with the duty of performing essentially administrative duties. Aside from this, the possibility of unseemly conflicts between the Secretary of Agriculture and the members of the Board would not appear to be in the public interest.

(3) A third procedural defect in this bill would appear to stem from the provision requiring the 15 members of the Board to be selected from among producers. Obviously, such a vital program would affect the economic interests of other segments of the dairy industry as well as producers, and it is believed that a more equitable basis should be selected upon which to base representation.

2. Hearing Clerk, Department of Agriculture

During the year, the Office of the Hearing Clerk of the United States Department of Agriculture was transferred from the jurisdiction of the Office of the Solicitor of the Department to the Office of the Judicial Officer of the Department. The Office of the Hearing Clerk was created in the mid-thirties because of the great number of hearings which it is necessary for the Department of Agriculture to conduct un-

der a large number of regulatory statutes. The Hearing Clerk's office was created to be a central office for the filing of documents, pleadings, and to keep the records with respect to these administrative proceedings. The office was attached to the Office of the Solicitor because, at that time, the Solicitor furnished the personnel which conducted most of these hearings; that is, the persons who acted as presiding officers. Since the passage of the Administrative Procedure Act in 1946, the persons presiding at hearings conducted under these statutes have been hearing examiners attached to a separate office in the Department, which office is not under the control of the Solicitor. Also, over 15 years ago, the Secretary delegated most of his regulatory functions, particularly in the quasi-judicial field, to an officer in the Department who is now known as the Judicial Officer, who makes all final decisions and issues all final orders which the Secretary is authorized to make. For some time, those persons interested in the Department of Agriculture have felt that, taking the foregoing developments into consideration, it would be desirable to place the Hearing Clerk under the jurisdiction of the Judicial Officer who, in reality, constitutes the highest hearing officer of the Department. For the most part, the function of the Solicitor in these matters is limited to that of representing the Department in these hearings whenever the Department appears as a party (there are some exceptions to this role of the Solicitor, as in the case of reparation proceedings, in which the Solicitor acts as deciding officer in contests between private persons). Accordingly, the recent move in transferring the Hearing Clerk to the jurisdiction of the Judicial Officer is generally regarded as a sound move, and it is further believed that it will be in the best interests of good administrative procedure within the Department.

3. Name of Office of Solicitor Changed

During the year, the name of the Office of the Solicitor of the United States Department of Agriculture was changed so that, hereafter, it will be known as the Office of the General Counsel of the Department. This change was effected by a Secretarial order.

4. Reports of Commission on Organization of the Executive Branch of the Government and of its Task Force

Obviously, the Reports of the Hoover Commission and of its Task Force on Legal Services and Procedure are of tremendous importance. Comparatively few persons realize, for example, that the Department of Agriculture is one of the largest regulatory agencies of the Federal Government. The Secretary of Agriculture is charged with the administration of a large number of important regulatory statutes. Among these are the Packers and Stockyards Act of 1921, as amended (7 U.S.C.A. 181 *et seq.*), and the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C.A. 601 *et seq.*). Under these statutes, the Secretary of Agriculture conducts rule-making proceedings and adjudicatory proceedings. Persons affected may seek judicial review. Like-

wise, rule-making and adjudicatory proceedings, with the attendant problems of judicial review, must be considered in connection with the work of the Food and Drug Administration of the Department of Health, Education, and Welfare.

Undoubtedly, in the near future, this Committee will be called upon to submit recommendations as to the effect of the Hoover Commission proposals on the activities of the agencies coming within the jurisdiction of the Committee. In anticipation of this, and purely by way of example, attention is called to a few areas of particular importance.

(1) *Milk Marketing Orders.*—(a) Under the Agricultural Marketing Agreement Act of 1937, as amended (7 U.S.C.A. 601 *et seq.*) the Secretary is authorized to issue milk marketing orders, upon the basis of records made at public hearings, which fix the prices which handlers must pay producers of milk. Under the present procedure, notice of a proposed order is published in the Federal Register, after which a hearing is conducted before a hearing examiner. The recommended decision, however, is issued over the signature of a subordinate official within the Department other than the hearing examiner. After this, interested persons may except to the recommended decision, and the Secretary of Agriculture issues a final determination in the matter. Actually, throughout this process, the Dairy Division of the Agricultural Marketing Service prepares the notice, the recommended decision, and the Secretary's decision. In many instances, the same official performs all of these activities. Under the recommendations of the Hoover Commission and of its Task Force, this procedure would be drastically changed by requiring the hearing examiner who presided at the hearing to formulate and issue an initial order without the assistance of the Dairy Division. Thereafter, the Secretary of Agriculture would be required to review the initial decision and any exceptions thereto, and to make a final decision without consulting the Dairy Division (the Secretary could, of course, delegate this function). This would effect a complete separation of functions and many persons think it would result in a fairer procedure. On the other hand, there are those who take the position that no one is qualified to write a milk order except specialized personnel in the Dairy Division.

(b) At the present time, the Rules of Practice do not provide for the use of subpoenas in connection with hearings to formulate milk orders. Under the recommendations of the Hoover Commission, the subpoena power would be available in these hearings.

(c) Under the present procedure, persons subject to a milk marketing order must normally resort to an administrative procedure before the Secretary to test the validity of the order or its application to them. This is a proceeding of a quasi-judicial nature. Under the recommendations of the Hoover Commission, persons affected by a milk marketing order would be entitled to seek a judicial review thereof immediately following the issuance of an

order without being compelled to resort to a second administrative proceeding.

Obviously, all of the foregoing presents questions of vital importance to the administration of the marketing programs.

(2) *Reparation orders.*—Under the recommendations of the Hoover Commission, the authority of the Secretary of Agriculture to award reparations for damages under certain statutes might be transferred to the courts. In the Task Force report, mention is made only of the authority of the Secretary to issue reparation orders under the Packers and Stockyards Act of 1921, as amended (7 U.S.C.A. 210), but the Secretary also has authority to issue reparation orders under the Perishable Agricultural Commodities Act (7 U.S.C.A. 499) Particularly under the latter statute, the Secretary conducts a large volume of business.

(3) *Cease and Desist Orders.*—Under the Packers and Stockyards Act of 1921, as amended (7 U.S.C.A. 181 *et seq.*), the Secretary is authorized to issue cease and desist orders with respect to certain discriminatory acts and practices, and this activity of the Secretary constitutes an important phase of his regulation of public stockyards. Under the recommendations of the Hoover Commission, the authority of the Secretary to issue these orders would be transferred to an Administrative Court. The Task Force Report mentions only the authority of the Secretary to issue cease and desist orders under Title II of the Act dealing with packers and omits any reference to the Secretary's authority, under Title III of the Act, to issue cease and desist orders with respect to stockyards.

(4) *Transfer of Food and Drug Administration to Department of Agriculture.*—The Task Force also suggests that the Food and Drug Administration of the Department of Health, Education, and Welfare be transferred to the Department of Agriculture where it was prior to 1940. Obviously, such a move would expand enormously the administrative activities of the Department.

Respectfully submitted,

COMMITTEE ON AGRICULTURE, FOOD, DRUGS, AND RELATED SUBJECTS

ALBERT E. STEPHAN
Chairman

JESSE E. BASKETTE
Vice-Chairman

COMMITTEE ON COMMUNICATIONS

GENERAL REPORT

This Report, as was the case with its predecessors in 1953 and 1954, will be concerned only with procedural developments during the past year—both administrative and judicial—which affect practice before the Federal Communications Commission. Matters of substantive communications law and legislation, falling within the purview of another Committee of this Association (i.e., its Standing Committee on Communications), are not treated or included herein.

I. Preliminary Statement

Procedural developments at the Federal Communications Commission in the past year (July 1954 to June 1955) continued along much the same lines marked out by it since its lifting of the "freeze" on the processing of television applications in mid-1952. (Prior reports of this Committee have outlined and examined such previous developments.) One significant change during the past year was the elimination of the heavy backlog of applications for new television stations requiring Commission processing, that had been present in the two prior years. The decreased pressures of immediacy resulting therefrom have permitted the Commission greater opportunity to effect other intended reforms of its procedures and practices, both of an internal and external nature. However, the volume of television hearing cases—with the varied procedural matters attendant thereon—has continued high, as has the level of Commission activity concerning the protest procedures of Section 309(c) of the Communications Act. Novel or not, the level and significance of such procedural matters at the F.C.C. are of major interest to those active in the field of administrative law and attentive to its proper development. For this reason they will here be set forth and analyzed in some detail.

II. Protest Procedures of Section 309(c) of the Communications Act

1. The bulk of the Commission's procedural attention and efforts in the past year has been devoted to Section 309(c) protest procedures. Perhaps no other single statutory provision or administrative regulation in the Commission's history has so preempted its procedural stage.[1] Its many necessary constructions of 309(c), the complicated legal and practical difficulties involved, its confused, often hit-and-miss formulation of policy thereon, the administrative short-cuts sought, the judicial stumbling blocks encountered, the suggested legislative reformation thereof—all demonstrate in microcosm the evolutionary process of administrative law in general that is of interest far beyond the reach of 309(c) alone.

At any rate, the Commission's difficulties and dissatisfaction with 309(c) (for reasons in part set forth hereinafter) have resulted in its recommending statutory revisions of that section. Other responsible voices have called for its outright repeal.[2] The Commission's legislative recommendations, together with others advanced by this Committee, have already been set forth in a recent "Special Report" of this Committee dated May 12, 1955, *infra,* and will be dealt with only in passing herein. Their adoption may well presage a different future history for Section 309(c).

2. The past year saw the emergence of more fixed and certain standards for Commission application of 309(c). The inconsistencies and reversals of its position that

[1] Commissioner Doerfer in recommending the repeal of 309(c) cited the disproportionate amount of time spent by the Commission on 309(c) matters, recently as much as 28% of all Commission deliberative activities.

[2] Ibid.

had marked the two previous years, while still occasionally evident, were significantly reduced. A tendency toward stricter standards was also demonstrated. These stemmed not only from the "shakedown" of Commission position on this novel procedure, but also from the acknowledged recognition that this drastic remedy has often been used as a competitive device for delaying beneficial grants [3] and from its action taken to discourage and avoid such use.

3. The Commission, as example thereof, has significantly tightened the jurisdictional requirement that protestant state facts with particularity, dismissing or limiting on this basis a number of protests generally asserting wrongdoing and error that might earlier have been granted. *WMIE-TV, Inc.,* 11 RR 1091; *Hyman Rosenblum,* 11 RR 825; *WBBF, Inc.,* 10 RR 1032a; *Van Curler Broadcasting Corp.,* 11 RR 215. And, after expiration of the thirty-day protest period, it dismissed as untimely a subsequent petition for reconsideration specifying facts not found in the original protest denied on this basis, *WBBF, Inc.,* 11 RR 487. Nor is it sufficient any longer for a protestant to allege that "it is informed and believes"; its allegations may be on information and belief, but they must be *facts. R. J. Laros & Brother,* 11 RR 335. However, despite the tendency toward greater strictness, in another instance the Commission held sufficient and set for hearing a generalized allegation that applicant had violated the Robinson-Patman Act, despite finding that "it is not clear . . . what the alleged violations . . . are or how the matter complained of is material . . ." *Granite State Broadcasting Co.* (WDNH), 12 RR 82, 87. And in another inconsistent and seemingly erroneous instance, the Commission found that a protestant has "failed to state with particularity sufficient facts, matters and things relied upon . . . [as to] whether applicant is financially qualified" and yet nonetheless ordered a hearing thereon with burden of proof on protestant. *Cumberland Valley Broadcasting Co.* (WBMC), 11 RR 840, 843.

4. In a variety of other ways, the Commission has sought to limit and expedite protest hearings. Thus, it has recently exercised a demurrer to protests, denying them when the alleged facts assumed to be true (or uncontested) are inadequate for setting aside the grant. *Hyman Rosenblum, supra.* Earlier, the Commission had failed to exercise the demurrer procedure. *Gulf Television Co., Inc.,* 11 RR 460.

In somewhat similar vein, the Commission has been affording some protestants oral arguments rather than full evidentiary hearings. *WMIE-TV, Inc., supra.* Such use of oral argument had heretofore been made, *Music Broadcasting Co.* (WGRD), 10 RR 554, but it has by now become an established procedure.

> "Facts, even though alleged with particularity, are insufficient to raise an issue for hearing when they are clearly frivolous or sham. In those

[3] See the Commission's letter to the Vice President respecting the proposed amendments to 309 (c), particularly Commissioner Doerfer's Separate Views thereof.

cases where the facts alleged are not frivolous but do not, in the tentative judgment of the Commission, constitute grounds for denial of the application involved, an oral argument will be held at which the policy and legal questions raised by the alleged facts will be resolved. Such argument is held upon the temporary assumption that the facts alleged are true. *Ohio Valley Broadcasting Corporation,* 10 Pike and Fischer, R.R. 500. Where there is no dispute as to the facts, the same procedure would be applicable. *Ohio Valley Broadcasting Corporation, supra.* The oral argument will be followed either by denial of the protest upon grounds of policy or law or by designation of the issues for evidentiary hearing. Where the facts alleged in the protest appear to warrant denial of the application, if true, an evidentiary hearing will be ordered." *Hyman Rosenblum, supra,* at p. 830.

In other instances where the "questions and issues raised" do not permit their being treated on demurrer and require an evidentiary hearing, one has been ordered, *Granite State Broadcasting Co., supra.*

Moreover, where an issue would alone ordinarily receive oral argument, it has been set for evidentiary hearing with several other issues so requiring (Id.; *Radio Cleveland* (WCLE), 11 RR 348. The Commission has elsewhere assigned only factual issues to an Examiner, reserving for itself determination of legal issues; the matter was not remanded for the Examiner's ultimate findings and conclusions, even though the Commission divided equally on the case and its reargument was ordered. *Cherry & Webb Broadcasting Co.,* 11 RR 633. However, when the oral argument indicated the need therefor, an evidentiary hearing has subsequently been ordered. *Hyman Rosenblum,* 12 RR 283, 284.

Finally, the Commission now fairly regularly modifies the issues proposed by protestant to conform to the facts actually pleaded. *WMIE-TV, supra; Hyman Rosenblum, supra.* Formerly it tended more to order such issues as were proposed without direct relation to protestants' allegations, thus inviting the lengthening of hearings and their records.[4]

5. The recent *Clarksburg Publishing Company* decision of the Court of Appeals raises serious doubts as to whether the Commission may validly exercise a demurrer to any protest or afford it only oral argument for hearing, both actions being found inadequate in the cited case (Par. VIII, 4 below). However, the legislative revisions of Section 309(c) recommended by the Commission would expressly delegate such authority to it and so free it from these judicial restraints. Moreover, pending such amendatory legislation, it is not unlikely that the Commission may, insofar as it can, narrow the Court's *Clarksburg* decision to the particular and peculiar facts there involved and continue to apply existing standards of demurrer and oral argument rather than full evidentiary hearing. Support for this view is found in the Commission's actions with respect to

[4] While the Commission appears to possess such modification power under present 309(c), it has recommended clarifying legislation to that effect.

another similar aspect of 309(c), its "new injury" standard, discussed below.

6. Commission limitation of the right of protest has also been achieved through its "new injury" standard for protests whereby it has required a "direct and causal" injury to protestant from the authorization complained of and denied standing when the injury has purportedly resulted from a prior authorization not protested. *Valley Telecasting Co.* (WFRU-TV), 12 RR 196; *Clarksville Broadcasting Co.* (WDXN), 10 RR 1274 (no standing to protest a grant specifying an AM site when prior grant on a site-to-be-determined basis was not protested); *Southwestern Publishing Co., Inc.* (KLRJ-TV), 11 RR 466 (modified CP moving applicant's main studio closer to protestant's city not subject to protest as no change in the competitive situation resulted); *Tri-State TV, Inc.* (WINT), 10 RR 1049 (no standing to protest authority extending construction permit). See also *WMIE-TV, Inc.,* 11 RR 1091.

However, when direct and causal injury was found from the protested authorization—as when a modified CP for a new site for the first time placed a principal city signal over protestant's city—protestant had standing as a party in interest. *Gulf Television Co.,* 11 RR 460. In *Houston Consolidated TV Co.* (KTRK-TV), this "new injury" requirement was applied to deny a protest against an STA granted to KTRK-TV in exact accordance with its CP; the Commission held it immaterial that the competitive situation had changed since the CP's grant in that KTRK-TV itself had since successfully protested a grant of modified CP to the now protesting party, the net result of which permitted KTRK-TV to proceed with its new operations although its competitor's were stayed under 309(c). 11 RR 531.[5]

This "new injury" standard had been applied as far back as early 1953 to deny a protest against an assignment of license on grounds that

> "there is no showing that as an existing station, protestant would suffer any economic or other injury from the operation of station KPLN by assignee as opposed to its operation by assignor." *Mid-South Broadcasting Co.* (KPLN), 9 RR 359, 360.

The Court of Appeals, however, subsequently reversed this Commission decision and held protestant to be a "party in interest" to the transfer. *Camden Radio, Inc.* v. *F. C. C.,* ..... F. 2d ..... (10 RR 2072). (See Par. VIII, 1 below.) Rather than interpreting the *Camden* decision as negating or modifying its requirement of "new injury" for standing, the Commission has narrowly construed it to hold that "an existing station is *per se* a party in interest to the transfer of a competing station in the same community," *WMIE-TV, Inc., supra,* at p. 1096, and thereafter continued to require the same showings in the many non-transfer matters above cited.

Some doubt appears justified, however, of the legality of such standard, particularly in the present judicial mood of strictly

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[5] The Commission had previously denied a request to withhold action on KTRK-TV's application which was sought so as to preserve the *status quo* pending hearing on KTRK-TV's protest. *Houston Consolidated,* 11 RR 529.

interpreting 309(c) to preserve rights to protest hearing. (Par. VIII, below.) The requirement continues to be challenged and no judicial sanction has yet been obtained for it. In *Greenville Television Co.,* ..... F. 2d ....., the Court stated:

> "We need not decide whether the Commission was right in requiring such a showing for we think the appellants made such showings." (Id., sec. 2.)

7. The Commission has refused to limit a protest hearing to the facts and matters urged in the protest. In *Gulf Television Co., Inc.* (KGUL-TV), it held that while protest issues are necessarily construed

> "in light of the specific facts, matters and things alleged in support of the protest from which the general scope of the inquiry permissible thereunder is ascertained,"

that protestant's testimony and proof are not so limited, 11 RR 822.[6] The aforementioned Court of Appeals' *Clarksburg* decision appears to support such holding. However, in *Hyman Rosenblum,* 12 RR 283, the Commission upheld an Examiner's refusal to permit evidence respecting the general affiliation practices of CBS beyond those in the city in question.

8. A new concept of "equitable estoppel" as grounds for denying a protest deemed inequitable and unjust was applied by the Commission in *Central City-Greenville B/C Co.* (WTMA), 11 RR 484, where protestant, one of two competing applicants in the same city, had previously amended to another frequency, permitting grants to both applicants on the same day, and thereafter on the last day of the protest period had protested the grant to the other applicant. However novel this concept, it appears somewhat more realistic than the Commission's alternative basis for denying the protest, i.e., that protested grant had been first on the Commission's agenda so that at the time of its grant, protestant was merely an applicant without standing as a party in interest.[7]

9. Earlier Commission decisions have for the most part already established fairly definite (and liberal) boundaries for determining the initial jurisdictional requirement as to who is a "party in interest" with standing to protest. However, in the past year, the Commission has further extended the confines of "party in interest" to the nonbroadcast sphere to include a common carrier radio licensee in the Domestic Public Land Mobile Service protesting the grant of a Special Industrial Radio Station to a plumbing and heating contractor. This

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[6] On such basis, it upheld the Examiner's permitting the subpoena for discovery purposes of six weeks of programming of permittee's station on a programming issue (protestant had requested 16 such weeks) although protestant's allegations of programming contrary to the public interest had been based upon its monitoring of one unspecified week of station operations.

[7] While the Commission has generally denied standing to mere applicants, it apparently overlooked such rule in *Radio Cleveland, Inc.* (WCLE), 11 RR 352, where protestant although an AM licensee protested an AM grant in its status as an applicant for a new frequency and higher power. While its protest was there denied on other grounds, the relief sought was obtained through modification of the grant by rehearing under Section 405.

protest was granted even though the parties were not competitors and although the authorization was only incidental to applicant's business. *R. J. Laros & Brother,* 11 RR 355.

Some question may be raised in view of the section's legislative history as to whether 309(c) procedures should at all be extended and applied to nonbroadcast matters. Furthermore, the decision is difficult to square with the earlier one of *Yellow Cab Company of Chicago, Illinois,* 9 RR 122a, where the Commission denied a protest by a competing cab company of a construction permit for a radio station in the Taxicab Radio Service, on grounds that:

> "The alleged injury stems primarily from the fact that the two companies are in a competing business rather than from the grant of this auxiliary radio station license. As such, it is considered to be too remote and not within the scope of either the Sander's case or Section 309(c)." *Yellow Cab Company of Chicago, Illinois,* 9 RR 122a, 123 (1953).

The *Yellow Cab* decision might here be distinguished in that instant protestant was a common carrier and its business directly depleted by the challenged grant to its former customer. However, in an even more recent case in which a common carrier telephone service in this same Mobile Radio Service protested a grant of a CP for a new television station, the Commission's denial thereof was predicated upon failure to state facts with particularity, and *not* upon grounds that protestant lacked standing, although there was no such loss of business as found in the *Laros* case. This may well forecast an even broader extension of the protest procedures into nonbroadcast fields.

10. In a number of instances the Commission has denied requests for temporary stay of a grant pending its determination of the protest within the thirty-day period allotted to it by 309(c) for this purpose. *Tri-County Broadcasting Co.* (WFTL-TV), 11 RR 614; *Cherry & Webb Broadcasting Co.,* 11 RR 974; *Hyman Rosenblum, supra; WJR,* 12 RR 209. The two standards here applied have been the traditional ones of showings of irreparable injury to petitioner and that there is a probability (occasionally overstated by the Commission to require a "reasonable certainty") that the protest will be granted. *Houston Consolidated TV Co., supra,* at p. 531.

11. Finally, in a number of recent AM cases, the Commission has in part gone back on its long-standing rule set forth in *Voice of Cullman,* 6 RR 164 (1950) and since restated on several occasions, most recently *Van Curler Broadcasting Co.,* 11 RR 215, that while economic injury may be the basis for achieving standing as a party in interest, no hearing would be held on this substantive issue of competition and competitive injury, *Radio Cleveland, Inc.* (WCLE), 11 RR 348; *Cumberland Valley Broadcasting Co., Inc.* (WBMC), 11 RR 840; *American Southern Broadcasters* (WPWR), 11 RR 1054; *Radio Tifton, Inc.* (WTIF), 11 RR 1167. In these cases, all involving AM stations in small markets, the Commission has afforded protestants hearings (generally oral argument) on the issue of the com-

petitive aspects of the grants of CP for a second station, pending its further consideration of this general substantive problem of competition. It has done so, however, in the face of its established rule referred to above, and also despite its express findings that allegations as to the elimination of competitors and resultant lower program quality are facts generally "incapable of proof"; that in any event "grave doubts" exist whether otherwise qualified applicants should be denied on this basis; that to do so would be "contrary to the entire regulatory scheme" and in spite of its admitted recognition that "to utilize the protest procedure to force a useless hearing on these issues would under such circumstances appear to be an abuse of process," *American Southern Broadcasters, supra,* at pp. 1055-6.

It may be that such oral arguments are being granted only in anticipation of or in response to recent Court of Appeals' decisions requiring hearings, such as *Storer* and *City of New York Municipal Broadcasting System* (Par. VIII, 5 and 6 below); in this event, opportunity for argument may be little more than a *pro forma* right in view of the Commission's already expressed strong opposition on the substantive merits. On the other hand, ordering these oral arguments may indicate the Commission's desire for re-examination of the legal and policy questions involved; if so, it would appear more advisable to proceed by over-all, general rule making rather than within the restricted confines of a few oral arguments on isolated protests.

III. Intervention in Hearing

The Commission has continued in a number of comparative TV proceedings to grant so-called "limited intervention" (i.e., restricted to issues in which interest is shown) to parties in interest who would suffer economic injury from grant of applications in hearing. *Allegheny Broadcasting Corp.,* 10 RR 1181; *St. Louis Telecast, Inc.,* 10 RR 1185; *Akron Broadcasting Corp.* (WCUE), 10 RR 1189.

The standard here applied for "parties in interest" was that of the *Sanders Bros.* decision (309 U. S. 470), similar to that applied to protests under Sec. 309(c), *Allegheny Broadcasting Corp., supra.* Accordingly, intervenor did not have to first allege and prove facts showing the applications were contrary to the public interest, since any such determination should follow rather than precede the hearing (Id.). But when its showing of economic injury was speculative and conjectural, a petition for intervention was denied. *Western Broadcasting Co., Inc.* (KIFN), 11 RR 313 (by Motions Commissioner Doerfer).

Intervention did not, however, enlarge the scope of a hearing's issues; when intervenor's status was based upon electrical interference, its evidence as to programming was proscribed in the absence of a formal expansion of issues. *Tupelo Broadcasting Co., Inc.* (WELO), 11 RR 316. As to those issues in which intervenor's interest is shown, however, it is entitled to full participation "in the same way as any other party." *Allegheny Broadcasting Corp., supra,* at p. 1184.

IV. Miscellaneous Procedural Rulings

1. A petitioner who had not objected to issuance of an AM construction permit nor to its subsequent modification was held not entitled as a matter of right to hearing on the application for license to cover said CP on grounds of interference to petitioner's station, *Deep South Broadcasting Co.* (WBAM), 10 RR 1045. This followed an earlier and similar protest decision, *Benton Broadcasting Service* (KBBA), 9 RR 586. The Commission declined to set the license application for hearing on its own motion inasmuch as the claimed interference was based upon daytime skywave propagation, itself the subject of pending rule making, and the Commission held it "inappropriate in the instant case to attempt to resolve the over-all daytime skywave interference problem," *Deep South, supra,* at p. 1048.

2. A miscellany of procedural rulings has come out of the hearing involving the renewal of TV Station WICU controlled by Edward Lamb at Erie, Pennsylvania. Thus, the licensee in such hearing was held entitled to a detailed statement of basic Commission charges, including specific false statements allegedly made by licensee's principal and other facts sought to be established, but not to evidentiary information such as the witnesses, etc., by which the Commission would seek to prove such charges. *Dispatch, Inc.,* 10 RR 1190. A motion for such detailed statement was held properly brought before the Commission, although the case was pending before an Examiner (Id.). The Commission thereafter refused to give further details of its case, although emphasizing the Examiner's authority to control the hearing, by continuances, etc., to insure due process to the licensee, *Dispatch, Inc.,* 11 RR 213. The licensee was held to have the burden of proof as to its countercharges under investigation (Id.).

3. In amending a number of its technical rules, the Commission denied "grandfather" immunity to existing applicants from the effect of the new rules. This was true of the new 10% rule in AM broadcasting, *In re Petition of Western Broadcasting Co., Inc.* (Docket 10509; FCC 54-1354; 11/1/54), as it was of the adoption of a new AM soil conductivity map, *Latrobe Broadcasters,* 10 RR 1038.

V. Hearing and Pre-Hearing Procedures

The past year has seen the initial "test under fire" of the Commission's revised pre-hearing and hearing procedures, particularly including written presentation of direct cases, adopted by it on July 15, 1954. Analysis and preliminary comment on these novel processes (set forth in Commission Rules 1.813 and 1.841) have already been made in a "Supplemental Statement" to this Committee's prior 1954 Report.

Final returns on such procedures are by no means in, so that no ultimate judgment as to their over-all value may now be made. Certain characteristics are, however, presently clear and varied judgments thereon already expressed. It has been emphasized, for example, that the procedures have often shortened the transcript of testimony and the time spent on this testimonial phase of the comparative proceedings, thus offer-

ing some practicable solution to the problem of voluminous hearing records.[8] Others observe, however, that essentially no more than a redistribution of attention and emphasis has been achieved, and at the cost of prolonging the pre-hearing and non-testimonial phases of hearing by attempts to fix and limit the course of hearing and contentions over the admissibility of written testimony. Unresolved then is whether these procedures have achieved *over-all* the hoped-for "economies of time and effort in the disposition of hearing cases" and the question of net gain or loss in so shifting the burdens of the hearing process from the Commission's Examiners to the parties, and particularly to their counsel. In addition, certain other disadvantages inherent in the new procedures, such as the "canning" of written testimony by counsel and the substantial loss of the important "credibility" factor present when applicants' principals appear in person before the Commission, must also be considered (see the 1954 Report, pp. 19-27 [6 Ad. L. Bul. 183-7], and Supplement).

When the tumult and shouting of the current heavy TV hearing activity have died down, a *de novo* revaluation and revision of hearing and pre-hearing procedures would appear a worthy objective. Experience gained during the past three years will be of unique utility thereto. The concerted, mutual effort of the Commission and the Bar alike should be marshalled for this critical task. It is the wonder of our administrative system that it can operate, and occasionally quite well, despite rudimentary and often inefficient machinery set up for it. However, the cost to the public interest of such imperfections, while it can be borne, should be reduced or eliminated if at all possible.

[8] As set forth in a recent address by the Commission's Chief Examiner, James D. Cunningham, before the Federal Communications Bar Association.

VI. Cease and Desist Procedures

The Commission has recently made somewhat more use of its statutory authority to issue "cease and desist" orders under Section 312(b) of the Communications Act. Such authority was enacted (in 1952) to permit more flexible administrative regulation by providing an intermediate remedy for "minor and less serious" violations by licensees without jeopardizing their basic authorizations. (See Senate and House Reports on the 1952 Amendments to the Communications Act; 10 RR 1041 and 1094.) Thus, such procedures were instituted (by Order to Show Cause why a cease and desist order should not issue) against television Station KTLA in Los Angeles, California, for telecasting the game "Play Marco," alleged to be an unlawful lottery under Section 1304 of the U. S. Criminal Code. Others involved a group of five AM stations in Pennsylvania for technical violations such as operating without a properly licensed engineer, as well as a number of small ship radio stations. All such instances were adjusted administratively by cessation of the actions in question prior to cease and desist orders being issued. Proceedings were also instituted against the operation of unauthorized television booster stations in the State of Washington, a hearing held and a decision now

pending as to whether cease and desist orders should issue. However, other requests for cease and desist orders were denied when they involved matters which were the subject of a protest hearing, *Gulf Television Co.,* 11 RR 460, 464, and when no substantial basis therefor was shown, *Hutchinson TV, Inc.* (KTVH), 11 RR 1060. An Order to Show Cause looking toward revocation of an AM station's (WGNS) license was recently issued for alleged violation of an outstanding cease and desist order against certain improper operating practices.

Cease and desist orders *per se* have been issued against the use of unauthorized industrial heating or welding equipment, *Prime, Inc.,* 12 RR 309; and a preliminary injunction has been obtained from the District Court and enforced to enjoin violations of such orders, *U. S.* v. *National Plastikwear Fashions, Inc.,* 11 RR 2021.

The Commission has, however, continued to make rather sparing use of "cease and desist" procedures in its broadcasting regulations. This is true even though such intermediate sanction offers a means whereby enforcement of its rules and policies could be obtained and the legality (as well as propriety) of its action might be adjudicated without at the same time invoking the extreme penalty of possible loss of license. Thus, the Commission has set applications for renewal of license for hearing on matters such as "horse racing broadcasts" otherwise adjustable by cease and desist procedures. *Community Broadcasting Service, Inc.* (WWBZ), ... RR ..... In particular view of its clear legislative history, it might be questioned, however, whether Section 312 (b) does not offer the superior remedy in such matters.

VII. Changes in the Commission's Procedural Rules and Practices

A. The Commission in the past year effected a number of modifications of its internal processes and mechanisms.

1. Added Duties and Responsibilities of the Chief Hearing Examiner

The Commission's recent appointment of a Chief Hearing Examiner to fill a position generally vacant during the past several years, has permitted the exercise of the established administrative duties of that office (Rule 0.82) which are of particular importance during the present period of substantial hearing activity.

The Commission thereafter augmented the status of that position by delegating to its Chief Examiner certain duties and responsibilities formerly resident in its Motions Commissioner and Hearing Examiners, so that he might act upon

> "(a) Initial specifications of the time and place of hearings to be conducted by hearing examiners where not otherwise specified by the Commission and excepting actions under authority delegated by Sec. 0.255.
>
> (b) Designation of the hearing examiner to preside at the hearing.
>
> (c) After a case has been designated for hearing and before the hearing examiner has issued an initial decision, on motions, petitions and other pleadings concerning
>
> (1) Petitions to intervene.

(2) Petitions filed by applicant requesting that its application or the proceeding thereon be dismissed.

(3) Dismissal of cease and desist and revocation proceedings.

(4) Requests for leave to file additional pleadings provided for in Sec. 1.730 and pleadings in excess of the length specified in Sec. 1.751.

(5) In the absence of the hearing examiner who has been designated to preside in a proceeding, to discharge the hearing examiner's functions delegated to him under Sec. 0.231." (New Rule 0.224.)

Recognizing the more effective administration sought by this delegation of authority to the Chief Examiner, it is clear that it must be administered so as to protect and preserve the independence of presiding officers in the matters before them.

2. New Duties of Office of Opinions and Review

The Commission has recently assigned certain new and additional duties to its Office of Opinions and Review. Section 5(c) of the Act *explicitly limits* its functions and duties to assisting the Commission as follows:

> ". . . by preparing a summary of the evidence" at hearing, and after initial decision and before oral argument, "preparing . . . a compilation of facts material to the [parties'] exceptions and replies thereto . . . and by preparing . . . without recommendations and in accordance with specific directions from the Commission . . . memoranda, opinions, decisions and orders."

However, the Commission by minute entry determined that the Office's duties should hereafter also "include review, analysis and comment on the factual, legal and technical matters involved" in the exceptions and replies to the Initial Decision (before oral argument), although it shall make no "recommendations" thereon to the Commission. The Office is also to provide "review, analysis and comment" on interlocutory pleadings in adjudicatory matters.

Substantial questions are raised to this action. Primary among them, of course, is that of exceeding the express statutory limitation [the Office "shall perform no duties of functions other . . . "], on which basis Commissioner Hyde dissented thereto. While Section 5(c) may be impracticable or unrealistic as drawn, no administrative action, irrespective of how reasonable or well-founded, may amend it.

Moreover, statutory limitation aside for the moment, parties' rights to oral argument upon exceptions and replies to Initial Decision can effectively be frustrated by *ex parte* memoranda from the Office of Opinions and Review available only to the Commission which prior to argument analyzes and comments upon such exceptions. It was precisely to avoid counsels' argument without knowledge of the staff's position and *in vacuo* therewith that the duties of this Office were so limited by Section 5(c). However, making such memoranda available to counsel for purposes of argument would go far to avoid this difficulty.

Furthermore, little practical distinction can be made between analysis-comment and recommendation; adverse comments upon analysis are no more and no less than rec-

ommendations. If an exception is stated to be without merit, unsupported by the record or contrary to precedent, there is no need formally to recommend its denial. In this way, as well, counsel may find the Commission already predisposed concerning oral argument prior to its being made. The same is true with respect to interlocutory pleadings before the Commission. In all such instances, the valuable first impression of a matter upon the Commission is dissipated.

* * * * *

B. Other procedural changes have more directly affected applicants and other parties before the Commission.

3. Time Allotted for Oral Argument

Section 1.854(e) of Commission Rules has been amended to provide for a flexible allotment of time for oral argument before the Commission depending on "the number and complexity of the issues involved and other pertinent factors" rather than the hard and fast limitation of 20 minutes per party previously applied.

4. Length of Pleadings

Limitations have been placed for the first time upon the length of pleadings that may be filed in certain matters. Thus, pleadings in the nature of an appeal from an interlocutory ruling by an Examiner and similar matters may not exceed "15 double-spaced typewritten pages in length" (Rule 1.751) and briefs or memoranda accompanying exceptions to Initial Decisions not to exceed 50 such pages (Rule 1.854(c)).

5. Public Notice of Requests for Rule Making

The Commission during the past year commenced giving public notice in its regular manner concerning requests for rule making in the broadcasting field. Publication of rule making requests as to Common Carrier and Safety and Special Services matters is apparently to follow. Such actions may well presage greater Commission attention in the future to the procedures of rule making and bring valuable reforms in this area long neglected by the necessary emphasis upon adjudicatory proceedings and matters.[9]

6. Elimination of the Anti-Straddling Rule for Television Applications

The Commission this past year deleted its processing rule adopted simultaneously with the 1952 lifting of the "freeze" (found in footnote 10 to Rule 1.371) which generally prohibited a permittee or licensee on one television channel from filing an application for another channel in that community. The extraordinary situation which prompted adoption of the rule (i.e., need for prompt TV development and the heavy backlog of applications and hearing cases) being a thing of the past, this prohibition against tying up two TV channels has now accordingly been deleted.

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[9] Since rule making may also vitally affect parties' rights and liabilities, if not their very existence, it is equally critical that fair, effective and thorough procedures be evolved for it as for adjudication.

VIII. Litigation on Procedural Matters

Judicial review by the U. S. Court of Appeals (District of Columbia Circuit) of procedural matters before the F. C. C. has also continued at a high and significant level during the past year. Much of it, concomitant with the many protest matters before the Commission, has been devoted to the Court's construction of Section 309(c). As indicated, the judicial tendency here has been preservation of the full measure of procedural relief which it holds to be accorded by 309(c) in contradistinction to the Commission's limitations on 309(c) rights stemming from administrative difficulties in its application.

1. Thus, in *Camden Radio Inc.* v. *F. C.C.*, ... F. 2d ....., 10 RR 2072, an existing licensee was held to have standing as a party in interest to protest the grant of an assignment of construction permit of another station in the same city from whose operation economic injury would result. The Court held improper the Commission's denial of the protest because injury stemmed from the creation of the station rather than from its assignment. Section 310(b) of the Act requiring the Commission to dispose of applications for transfer as if the proposed transferee were applying for a new station under Section 308, the protest procedures were held to apply in full to such transfers.[10]

The Commission's construction of the *Camden Radio* decision, limiting its applicability to transfer matters, has already been adverted to (Par. II, 6 above).

2. In *Greenville Television Co.* v. *F. C. C.*, ... F. 2d ....., the Court held appellant stations were parties in interest to protest a modified CP authorizing a station in a nearby city to move to a new and closer site affording stronger signal strength over protestants' city. Finding the necessary economic injury (which the Commission held non-existent [11]) in protestants' allegation that such new site would cause loss of their network affiliations, the Court held immaterial the Commission's position that the affiliation was the result of private negotiation and not ordered by it, since

> ". . . the economic injury that gives standing . . . to oppose Commission action, is seldom if ever a direct result of Commission action . . . [which] only creates a situation in which the new licensee may be able to get the revenue by private negotiation . . ."

3. In *Metropolitan Television Co.* v. *F. C. C.*, ... F. 2d ....., 12 RR 2001, the Court again reversed the Commission to hold a radio station a party in interest to another AM grant at a city 330 miles away which caused it economic injury by destructive interference within its service areas *although* outside of its normally protected contours. This likelihood of economic injury was held sufficient for standing although the Commission, in attempting to set up some definitive limitation on the jurisdictional requirement of specificity, had held it too "conjectural and specula-

[10] The Commission's subsequent petition for rehearing was denied by the Court, ... F. 2d ....., on grounds of the Supreme Court's decision in the *Sanders* case.

[11] *Sparton Radiocasting Co.*, 10 RR 1018; see Par. II, 6 above.

tive." *Alvarado Broadcasting Co., Inc.* (KOAT), 10 RR 381, 384. The Court's decision re-emphasized the practical nature of the inquiry as to possible economic injury, which, it makes clear, is not to be limited to that recognized in the Commission's Rules respecting station contours or grades of service.

This decision also settled the question that a Commission order denying protest is reviewable under Section 402(b) of the Act and not under 402(a).

4. In a recent decision of particular significance, *Clarksburg Publishing Company* v. *F. C. C.*, ... F. 2d ..... (decided June 9, 1955), the Court undertook *inter alia* a fairly exhaustive review of the Commission's protest and other procedures and struck down a significant part of the Commission's evolved processes for expediting the consideration and hearing on protests. In the first instance, the Court held improper the Commission's denial of the protest by a local newspaper against a TV grant at Clarksburg as resting upon "a seriously inadequate record" resulting from Commission treatment of the protest "as if admitted by demurrer and [since it] limited the 'hearing' to oral argument." In this case, in which serious questions were raised respecting undue concentration of control—*if not* in all cases of "unresolved factual issues"—a full evidentiary hearing must be held.

> "The [Commission's] inquiry cannot be limited to the facts alleged in the protest where the Commission has reason to believe, either from the protest or its own files, that a full evidentiary hearing may develop other relevant information not in the possession of the protestant." [12]

Here, too, practical considerations of economic injury were held controlling rather than Commission standards or grades of service. The Commission was held to have erred in its evaluation of the substantive issue of concentration of control of the mass media of communications by not considering therein program service from another, distant TV station controlled by grantee which was brought to Clarksburg by means of community antenna systems. Such consideration, the Court ruled, could not be avoided by the Commission merely because community antenna service is novel, its regulatory status not resolved at the Commission, and the grantee had no interest in such systems.

The Court's decision also throws considerable doubt on the propriety of the Commission's application processing procedures whereby "quick" grants were made of applications becoming unopposed through dismissal or merger of previously mutually exclusive applications.[13] The Court firmly distinguished between the Commission's preliminary determination

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[12] However, such information, if any, was in the Commission's possession when it initially considered and granted the application. Furthermore, the decision appears to overlook relevant legislative history of Section 309(c) in which revisions in antecedent legislative proposals (S. 1973, 81st Cong., 1st Sess.) were made specifically to provide for Commission demurrer authority to determine if the protest stated a justifiable cause of action. (See Hearings on S. 1973.)

[13] See this Committee's 1954 Report, pp. 2-6, 6 Ad. L. Bul. 174-6.

for purposes of Section 308(b) that an applicant was legally, financially and technically qualified and its separate conclusion required by Section 309(a) that the grant would serve the public interest. The latter consideration is not to follow *ipso facto* from the former, since the Commission is not merely a "traffic policeman" as to 308(b) qualifications. Here, too, the record was inadequate for proper final decision, as it was respecting other questions, including that of the propriety of grantee's payment of some $15,000 to the dismissing applicant, supported in the record by nothing more than an unsworn statement by its counsel that such payments were properly for no more than "out-of-pocket expenses."

In any event, *Clarksburg's* striking down or casting of considerable doubt upon those processes (demurrer, oral argument, etc.) whereby the Commission has sought to limit protest procedures and to prevent their use for competitive delaying tactics, makes that much stronger the necessity for statutory reformation of Section 309(c) to establish such Commission authority which is now pending before the Congress and has heretofore been discussed in this Committee's recent Special Report (*infra*).

5. Rights to hearing upon an application were also zealously protected by the Court in two other cases, *Storer Broadcasting Company* v. *F. C. C.*, ... F. 2d ....., and *New York Municipal Broadcasting System* v. *F. C. C.*, ... F. 2d ....., 12 RR 2003.

In the *Storer* case the Court struck down that part of the Commission's multiple ownership rules providing an absolute limitation of five television stations which could be authorized to any one licensee [14] on which basis *Storer's* application for a sixth TV station had summarily been dismissed without hearing. It held the Commission denied due process in not affording the hearing required by Section 309(b) to an application for an available frequency sought for lawful use, and that the Commission lacked power to predetermine by a binding rule adopted *in vacuo* that there could never be an instance in which the public interest could be served by granting a sixth TV station to any applicant. Such determination could only be made *ad hoc* after hearing upon all applicable and relevant facts and circumstances. While not all applications required a hearing, the exceptions to the command of Section 309(b) (e.g., application by an admitted alien, or for an unlawful use or purpose, *F. C. C.* v. *American Broadcasting Co.,* 347 U. S. 284, or for a channel not assigned to or available at the community in the Table of Television Assignments, *Logansport Broadcasting Corp.* v. *U. S.,* 210 F. 2d 24) [15] were

[14] Section 3.636(a)(2) and comparable rules as to AM and FM held in applicable part that "The Commission however will in any event consider that there would be such a concentration of control contrary to the public interest, convenience or necessity . . ." in ownership or interest in more than five TV stations.

[15] This *Storer* decision and that subsequent one of the *City of New York Municipal Broadcasting System* somewhat obscure the basis of the Court's prior determination respecting such TV applications for channels not in the Table of Assignments, which appears to be the only instance of a contemplated lawful and non-frivolous use where an application may summarily be rejected administratively without hearing.

held to be of a limited nature and not here applicable.

6. This requirement of hearing was carried even further in *City of New York Municipal Broadcasting System* where applicant requested both an authority proscribed by the Commission's Rules and for waiver of the Rule prohibiting such grant. There, appellant licensee sought to operate a single transmitter with a rated power of both 1 kw and 5 kw to be used respectively for both regular broadcasting and for special defense operations, requiring waiver of Rule 3.41 prohibiting stations of its class from installing more than 1 kw transmitters. Without affording either the requested oral argument or hearing, the Commission denied the application as not showing the compelling need for waiver of Rule 3.41. The Court reversed on failure to provide the hearing required by Section 309(b), this held not to be one of those limited exceptions to that statutory procedural commandment.

This decision is a striking demonstration of the current difference in judicial and administrative attitudes toward procedural requirements. Attuned to the protracted and bitter comparative television proceedings, with their consequent procedural disabilities, the Commission seems to contemplate "hearings" in those terms and so refuses to hold them in dissimilar instances such as found in *City of New York Municipal Broadcasting System.* The Courts, however, otherwise view procedures before the Commission and indicate a more flexible attitude toward hearings that the Commission could here well emulate. They apparently require that a lawful, *bona fide* applicant secure *some opportunity* beyond its bare written application for presenting its position to the Commission—be it by oral argument or hearing—whereby it may seek to establish the public interest considerations of its application. Viewed as a limitation on agency power of dismissal on the basis of an application alone, *City of New York Municipal Broadcasting System* is another expression of recent decisions in this and other fields emphasizing the preservation of the right to hearing as a bulwark against arbitrary administrative action.

7. In *Lamb et al.* v. *Hyde et al.,* ..... F. 2d ....., 12 RR 2016, the Court of Appeals upheld the District Court's denial of a preliminary injunction to Edward Lamb against the hearing ordered by the Commission on the application for renewal of license of Lamb's TV Station WICU and the lower court's dismissal of his complaint. Affirmation was on the ground of appellant's failure to exhaust administrative remedies.

8. The Supreme Court in *F. C. C.* v. *Allentown Broadcasting Corp.,* 349 U. S. ..... (decided June 6, 1955), has recently held that the Court of Appeals erred in reversing the Commission's decision respecting mutually exclusive applications for an AM station. Involved and significant here was the procedural question respecting the scope of permissible Commission review and revision of Examiner findings as to evasiveness and lack of candor of certain witnesses, the Commission having itself

previously overruled the recommendations of its Examiner on this and other matters.

The Court of Appeals had determined (by a 2-1 margin, ... F. 2d ....., 10 RR 2086) that the Commission could not overrule its Examiners on these matters "without a very substantial preponderance in the testimony as recorded . . . ." Holding this too strict a standard for agency review of an Examiner's findings, the Supreme Court applied rather the test of "substantial evidence on the record considered as a whole," as set forth in *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 470, 493, and the Administrative Procedure Act (Sec. 8). On this and other bases it remanded the matter to the Court of Appeals for its reconsideration thereof.

While the Supreme Court's position on this procedural question is not made explicit, it seemingly adopts the Commission's view of treating instant evidentiary matter as one in which the essential testimony is of record, totally reviewable by the administrative agency, rather than findings on demeanor not reflected upon the record of which the Examiner may have some special and peculiar knowledge.

June 17, 1955.

SPECIAL REPORT ON S. 1648 AND H. R. 5614

(to amend Section 309(c) of the Communications Act of 1934, as amended, in regard to protests of grants of instruments of authorization without hearing)

I. History of S. 1648 and H. R. 5614

1. The Commission in a recent letter to the Vice President (FCC 15677), and for the reasons set forth therein, recommended certain amendments to Section 309(c) (protest procedures) of the Communications Act. The Commission's proposed redraft of Section 309(c) which effectuated the said changes was incorporated as the text of S. 1648 and H. R. 5614, 84th Congress, here under consideration.

II. Summary of this Report

2. Briefly stated, the position of this report is that amendatory reform of Section 309(c) is urgently required; that the amendments proposed thereto by the Commission should be adopted in toto with the exception of one revision necessary for purposes of clarification; that, however, the Commission's proposals do not go sufficiently far in accomplishing the necessary reforms, so that certain other amendments herein recommended should be adopted for their achievement; and that Section 309(c) receive continuing close observation in the future to insure that its application be and remain in the public interest.

III. Background of Need for Revision of Section 309(c)

3. The protest provisions of Section 309(c) of the Communications Act reflected long-felt need for and long-sought procedural reform of that organic Act. This statutory provision was designed to afford adversely affected parties an administrative review of Commission grants prior to extended litigation thereon and prior to the *fait accompli* of construction under the challenged grant while practicable relief from asserted improper action was still available. It did so by commanding fairly

immediate Commission action on the protest and upon grant of the protest, by requiring preservation of the status quo through mandatory stay of the authorization pending hearing on and determination of the protest. By and large, it is safely asserted that the basic objectives of 309(c) remain compelling today and that, in the absence of countervailing considerations, they dictate retention of this procedural remedy.

4. At the same time it is universally recognized that procedural abuses and infirmities unknown and unanticipated at its enactment have attended the three-year application of Section 309(c). These flaws have resulted from many and diverse factors. Thus, the fairly liberal interpretation of "parties in interest" by Commission and Courts alike, giving standing on a slight showing of economic injury, has been a main factor. This, together with the mandatory stay and the absence of any effective limitations upon the scope of protest hearing, has resulted in the section's use primarily as a competitive device for delaying purposes by existing interests against new services. Unfortunately, lengthy delays in establishment of such new services—already found to be in the public interest—have been the consequence. The 309(c) requirement for an expedited protest hearing —obviously aimed at avoiding these delays —has resulted in nothing more than the hearing initially being set on 15 days' instead of 30 days' notice; it has been totally ineffective in preventing such abuse and misuse of the protest procedures.

5. If Section 309(c) is to be retained (and responsible and persuasive arguments have been made for its complete extinction [1]), these procedural disabilities now infecting it must be severely reduced, if not eliminated. Ways and means must be developed to achieve the two-fold objective of retaining the admitted benefits of the protest rule in balance with reasonable and fair procedures for its effectuation. Without dispute, there is no room in the critical broadcasting field for the demonstrated harsh and inequitable procedural consequences of Section 309(c) that have too often benefited only the private interest at the expense of the public.

IV. Comments on the Commission's Recommended Amendments Contained in S. 1648

6. The recommended amendments of the Commission set forth in S. 1648 take a necessary step toward procedural reform of 309(c). S. 1648 retains the essence and basic purposes of the protest procedure by maintaining the right of adversely affected parties to prior administrative review of their challenge to the authorization. At the same time it incorporates three basic reforms, all intended to limit the scope of the protest procedure and to further expedite it, in the aim of discouraging non-bona fide protests filed merely for dilatory, competitive purposes. These three reforms are, respectively, as follows:

a. Providing the Commission with a "demurrer" power to dismiss a protest as "in-

[1] See the Separate Views of Commissioner Doerfer re recommended legislation affecting 309(c).

sufficient in law" even if the asserted facts be presumed to be proved. This power would be utilized to deny groundless protests at the threshold, to make unnecessary the holding of an evidentiary hearing that would ultimately be meaningless. While the Commission already appears to possess such power under present 309(c), and has in fact exercised it, a clarifying amendment to this effect appears advisable.

b. Providing the Commission with authority to redraft issues urged by protestant in accordance with and to bring them closer in line with the facts and substantive matters set forth in the protest. Here, too, such power would tend to expedite by confining any protest hearing within the reasonable bounds of the facts and matters alleged by protestant. The Commission should clearly be removed from the straitjacket (albeit in part of its own making [2]) purportedly binding it to specify self-serving issues urged by protestants on the broadest, most inclusive and factually unrelated bases. Here, too, the Commission seems already to hold this power but clarification thereof may be beneficial.

However, revision of that portion of S. 1648 purportedly incorporating such Commission authority (i.e., page 2, lines 18-19 and 21-25) is necessary to remove unfortunately misleading and ambiguous language that might well require unanticipated and harmful future construction of 309(c). Briefly, S. 1648 fails to make the necessary, clear distinction between issues revised by the Commission (referred to as "further issues as it may prescribe"), and those issues "adopted" by the Commission. It refers also (page 2, lines 22-24) to a seemingly third and unrelated category of issue, i.e., those "specified by the Commission upon its own initiative." Such ambiguity might well result in a construction over-dignifying issues redrafted by the Commission, raising them to equal status with issues "specifically adopted" by it, a different specie entirely, and consequently shifting to applicant on such revised issues the burdens of going forward and of proof that accompany issues "adopted" by the Commission.

Recommended language to accomplish the necessary rewording of S. 1648 is set forth in Section 8 herein.

c. Providing the Commission with discretionary stay authority in place of the present mandatory stay requirement. The discretionary stay authority recommended by the Commission seems, at this stage of 309(c) development, a reasonable compromise between those opposite positions calling for preservation of the mandatory stay in its existing form and those urging the total abandonment of any stay upon protest. It recognizes alike and seeks to make provision for the merits as well as the disadvantages of any maintenance of the status quo pending hearing upon the protest. At the same time, the provision is clearly one of limited discretion; it permits only some slight relaxation of the inflexible compulsion of mandatory stay that operated irrespective of facts and circumstances,[3] and it enables the Commission to refuse a

[2] Much of the present difficulties with 309(c) might well have been averted by early, sound and far-sighted Commission construction of it.

[3] Except, of course, with respect to the maintenance or conduct of an existing service as now provided in Section 309(c).

stay in extraordinary instances in which, for reasons of need for service, equities between the parties and the like, it would be contrary to the public interest. Such result is effectuated by language carefully providing for mandatory stay "unless the Commission affirmatively" and specifically finds otherwise. This language would expressly negative the exercise of an unrestricted administrative discretion without tangible criteria for its application that has often in the past resulted in complaints of arbitrary and inconsistent agency decisions.

V. Further Recommended Amendment of Section 309(c)

7. S. 1648 as it now stands, it is submitted, does not go far enough in reformation of present Section 309(c) to minimize, if not eliminate, the unsalutary effects of delay in establishing a new service already found to be in the public interest and in expeditiously resolving the issues raised by protest. Whether the authorization is stayed, as will be the ordinary case under a revised 309(c), or whether it remain in effect, every reason exists for reasonably limiting the scope of the protest procedure and expediting it in all feasible ways. Such limitation and expedition are thoroughly in accord with the fundamental objectives and intention of Section 309(c), as well as with sound administrative practice concerning this special procedural remedy.

8. To accomplish such objectives, it is recommended that Section 309(c) be further amended as follows:

> "(c) When any instrument of authorization is granted by the Commission without a hearing as provided in sub-section (a) hereof, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing *on said protest to the application* so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, *and shall include a complete and particularized statement of facts which protestant relies upon and expects to prove* as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate *the protest* for hearing upon issues relating to all *facts* specified in the protest as grounds for setting aside the grant, except with respect to such matters as to which the Commission finds, *after oral argument by the parties thereon, and* for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission *may in such decision redraft the issues urged by protestant in accordance with the facts or substantive matters alleged in the protest,* may also specify in such decision that the protest be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the facts specified in the protest. In any hearing subsequently held *upon such protest* issues specified by the Commission upon its own ini-

tiative or adopted by it shall be tried in the same manner provided in sub-section (b) hereof, but with respect to issues resulting from facts set forth in the protest and not adopted *or specified by the Commission on its own initiative*, both the burden of proceeding with the introduction of evidence and the burden of such proof shall be upon protestant, *whose proof shall be limited to the material and relevant facts set forth in the protest.* The hearing and determination of cases arising under this sub-section shall be expedited by the Commission *during all stages of the hearing process and shall be set for as early a hearing or oral argument, as the case may be, as is reasonably feasible for the Commission.* Pending hearing and decision the effective date of the Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commission shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing." (Italics added to emphasize new or amended provisions discussed hereinbelow.)

9. It is believed that the above-proposed revision of 309(c) is the most effective means of accomplishing the aforesaid two-fold objective (i.e., preserving benefits of 309(c) as well as achieving its procedural reform) for the following reasons:

a. It incorporates the intent and express language of the Commission's recommended amendments and in every instance save one, in which proposed language is clarified to expressly provide for the Commission's authority to revise the issues.

b. It limits the scope of the protest hearing, reduces the coercive effects of any stay and expedites the protest hearing in a variety of ways. Principally, it does so by providing that any hearing held shall be "upon the *protest*" rather than upon the challenged "authorization" or on the "application" which the Commission has already found to be in the public interest. Such provision for hearing "on the protest" makes clearer the unusual and limited nature of this remedy and expresses conceptually the burden otherwise put upon protestant in 309(c) of proving *its case* challenging the authorization.[4] The protest, and not the already granted but stayed authorization, is to be heard.

c. It provides for an oral argument before the Commission upon its consideration by demurrer of any protest. This

[4] The Commission has heretofore recognized the special limited nature of protest hearings; thus, in *Cherry & Webb Broadcasting Company,* overruling protestant's objection to its limiting the Examiner's Initial Decision to findings of fact, the Commission expressly stated that

> "It must be emphasized that the hearing rights to be safeguarded to the parties in this proceeding are not those inherent in a comparative proceeding but are those stemming from the Commission's action under the Section 309(c) protest proceeding" (10 RR 181, 185).

would accord with the recent decision of the United States Court of Appeals (App., D. C.) in *City of New York Municipal Broadcasting System* (Case No. 12465, decided May 5, 1955) that an applicant is entitled to such presentation by hearing or oral argument, on its application, the spirit and purport of which is properly applicable to Commission consideration of and ruling upon protests.

d. Its requirement that the Commission expedite a protest during all stages of the hearing process, and accordingly hear the protest as soon as reasonably feasible, provides real substance and "teeth" to the present general requirement of expedition. The limiting factor on an early hearing would be the convenience and protection of the Commission and its processes rather than the needs of protestant whose presentation would in any event be limited to the facts of his protest and for which he should reasonably be prepared. Moreover, the provision is intended to stimulate such other procedural reforms in the interests of expedition as the Commission may find to be consistent with fair and orderly process, accord with the special nature of the protest proceeding and be in the public interest. Thus, the Commission should, upon enactment of this provision, review its rules governing hearings and upon reconsideration thereof may well establish a different and shorter time table for filing findings, exceptions, replies, etc., for protest hearings than provided for comparative proceedings or full hearings on original applications.

e. It requires that the protest include a complete statement of the facts relied upon to challenge the grant and expected to be proved, and thereafter limits any hearing on said protest (where issues are not specifically adopted by the Commission) to proof of such asserted material and relevant facts. Here is perhaps the most effective means for limiting the scope of the protest hearing and minimizing the harmful delays occasioned by a stay or the requirements of a protest hearing.

(1) Otherwise, under present and proposed Section 309(c) as construed by the Commission, protestant who merely demonstrates standing to protest, and alleges certain matters substantively attacking the grant, is thereafter at hearing on the protest perfectly free to abandon its protest allegations of fact and matters at issue and unrestrainedly able to seek to develop wholly new facts designed to show for any new reason whatever that the grant was not in the public interest. The protest thus serves as a mere foot in a door that is swung wide open at hearing. Delay is recognizedly to protestant's private competitive advantage and since its counsel undoubtedly possesses the inventiveness characteristic of practitioners in this field, the hearing in this way can be made to stretch an undue, if not interminable, period. Also in this way, the inherent slowness of the administrative process (requiring testimony, depositions, findings, decisions, arguments, etc.) can be even further retarded. Permitting protestants at hearing to embark on "fishing expeditions" for a substantive case, 309(c) encourages

the filing of sham protests merely for competitive purposes of delay. Particularly is this true in the absence of any practically effective reprisal (such as filing bonds or payment of costs, etc.) for the filing of groundless protests. Even for protests bona fide in origin, however, the price paid for such delays, both in the public's interest in a new service and permittees' interest in expeditious determination of the issue raised, is excessive.

(2) The Commission in exercising its recommended power of demurrer to the protest would limit protestant to the facts asserted therein and rule upon the legal sufficiency of such facts. No reason exists why the subsequent hearing on the protest, assuming such legal sufficiency (and denial of the demurrer), should not likewise be limited to proof of the facts asserted therein.

(3) Not only is there presently need for such recommended revisions, but the legislative and administrative history of 309(c) make clear that these provisions (i.e., requiring a complete statement of facts in the protest and limiting the hearing to proof of such facts) were essential parts of the protest procedure from its very inception. They are then not newly derived provisions but rather original and natural restrictions upon the protest hearing in response to the early recognized need for its limitation and expedition. Present 309(c) could have been so construed; irrespective thereof, 309(c) should now be modified to expressly so provide.

(4) Present 309(c) stems from and is "substantially a redraft of certain regulations which were adopted by the Federal Radio Commission . . . and which were continued in effect by the present Commission for a period of time after its organization [until] repealed effective August 1, 1939." So stated the Federal Communications Bar Association comments to H.R. 5497 (77th Cong., 2nd Sess.) [5] drafted and sponsored by it, which was the original statutory proposal for a protest procedure. This proposal evolved successively, and in substantially similar form, through legislation in subsequent Congresses until enacted in 1952.[6] The antecedent Federal Radio Commission Rule 45 and its coun-

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[5] Louis G. Caldwell's comments on H.R. 5497 also stated that its protest procedure was "almost exactly the same phraseology" as found in the earlier F.R.C. and F.C.C. Rules.

[6] Briefly stated, the respective protest provisions of H.R. 5497 and subsequent S. 814 (78th Cong., 1st Sess.) were substantially identical (e. g., the Commission's comments on the former were expressly made applicable in toto to the latter, Hearings on S. 814, at p. 9); later S. 1333 (80th Cong., 1st Sess.) added the requirements that protestant bear the burdens of proof and proceeding with the introduction of evidence and that the protest hearing be expedited; the following S. 1973 (81st Cong., 1st Sess.) and its almost identical successor S. 658 (82nd Cong., 1st Sess.) dropped the formerly-included definition of persons "adversely affected" by a grant without hearing and added requirements that protestant state facts with particularity and that the Commission find whether the protest met "the foregoing requirements" in order to provide for Commission demurrer to determine if the protest stated a justifiable cause of action, and finally S. 658 (82nd Cong., 1st Sess.) the so-called McFarland Act amendments containing what is now Section 309 (c).

terpart Federal Communications Rules 105.21 both expressly provided that the verified protest should contain ". . . 2. A terse *yet complete statement of facts which protestant expects to prove* upon the hearing . . ." (emphasis added). And the Rules of both the F.R.C. and F.C.C. (Rule 104.4) provided that upon protest the application involved "will be *set for hearing* in the same manner *in which other applications are set for hearing.*" It seems to have been the slight and seemingly not so intended change of language in present 309(c) respecting issues adopted by the Commission (i.e., that they "shall be tried in the same manner provided in subsection (b) hereof") that unwarrantedly led to the Commission's construction for a wide-open and unlimited protest hearing which so compellingly requires correction now.

VI. Future Application of Revised Section 309(c)

Continuing close observation should be given the future application of a revised 309(c) to insure that its benefits are not achieved at an undue cost and that its future retention in balance remains affirmatively in the public interest. Should it prove impossible by such reforms as here suggested to eliminate the adverse effects of the stay and its maintenance of the status quo, the need for discarding this provision, and with it the entire protest procedure of 309(c), may have to be faced.

VII. Conclusions and Recommendations

(1) Section 309(c) should be retained, but only in conjunction with procedural reforms to eliminate abuses and misuses in the protest hearing process.

(2) The Commission's recommendations for revising Section 309(c) should be enacted; its proposals for a discretionary stay, as well as the clarifications it seeks for its power of demurrer and to redraft protest issues should be adopted, the latter however first requiring clarification.

(3) The protest procedures should be limited and expedited to eliminate the delays in hearing and disposing of protests.

(4) Any hearing should be "on the protest" which should be required to set forth all of the facts on which it intends to rely and the hearing should generally be limited to proof of those material and relevant facts.

(5) Oral argument should be granted by the Commission upon its consideration by demurrer of any protest.

(6) Close observation should be given the future application of Section 309(c) to insure its continued operation in the public interest.

May 12, 1955

SUPPLEMENTAL STATEMENT TO SPECIAL REPORT ON S. 1648 AND H. R. 5614

This statement is intended to supplement the Special Report of the Committee on Communications dated May 12, 1955, by providing a historical background of 309 (c) protest procedures, the legislative revision of which was the subject of said Special Report.

Section 309(c) in its present form [1] was enacted into law as part of a comprehensive revision of Commission procedures, both its internal structure and its administrative and appellate processes, contained in Pub. L. No. 554 (82d Cong.) effective July 16, 1952, 66 Stat. 715, known colloquially as the McFarland Act Amendments of 1952. This Act was "the end product of more than a decade of congressional investigations, studies, hearings and reports by committees in both Houses of Congress," [2] including a total of 45 days of hearing comprising 3700 pages of testimony by over 145 witnesses. The amendments were unanimously supported by every broadcast interest which testified, and a majority of them by the F.C.C. itself. 309(c) protest procedures were and had always been a prime component of such procedural reforms.[3]

Section 309(c) provided "a method whereby any person, who has the right to challenge the legality or propriety of such a grant by appeal from the Commission's decision, can make this complaint first before the Commission—a guaranty which the present law does not contain" and the need for which "has been clearly demonstrated by experience." [4] These long-sought procedures thus afforded an opportunity for adversely affected parties in interest (as defined in prior judicial decisions) to obtain administrative review of Commission grants before extended litigation thereon, and while practicable relief from the challenged grant was still possible, namely, before actual construction of the facilities in question.

It became clear, however, rather soon after its enactment that 309(c) was particularly susceptible of abuse and was being used for selfish self-aggrandizement by competitors of the forthcoming service to delay its establishment. Responsible critics have urged its use has been "primarily" for such purposes.[5] The recommended revisions of 309(c) were intended "to obviate the use of the new procedure as a [delaying] device," [6] by limiting and expediting the protest hearing, while retaining the basic objectives and essential justice of these procedures. (See also Sec. III of the Special Report.)

Recent judicial developments (even since the preparation of the Special Report)

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[1] With the sole exception of the time limitation within which the Commission is required to act upon protests, originally 15 but now 30 days pursuant to a 1954 statutory revision.

[2] Senate Report on Communications Act Amendments, 1952 (S. 658), contained in 1 Pike & Fischer Radio Regulation (RR) 10:271. S. 658 was identical to two prior bills, S. 1973 and H.R. 4251, passed unanimously by the Senate in 1949 and 1950, respectively.

[3] Legislative proposals for a protest procedure had initiated as early as 1940 (H.R. 5497, 77th Cong.), as drafted and sponsored by the Federal Communications Bar, and had evolved with only minor modification through a series of successive legislative proposals to present 309(c). These statutory provisions were intended to replace a similar administrative protest procedure adopted by the Federal Radio Commission in 1931 and continued in effect by it and its successor Communications Commission until mid-1939.

[4] Senate Report, *supra,* Sec. 8.

[5] Commissioner Doerfer in his Separate Views to the recommended revisions of Section 309(c).

[6] Commission's letter to the Vice President re recommended revisions.

make even clearer the need for legislative reformation of 309(c). The U. S. Court of Appeals (D.C.) has in *Clarksburg Publishing Company* v. *F.C.C.*, ... F. 2d ....., 12 RR ..... (decided June 9, 1955), struck down as improper the Commission's use in that case of the demurrer procedure and oral argument on protest in place of a full evidentiary hearing (the very processes used by the Commission to limit and expedite protests) and cast considerable doubt as to the propriety of such processes with *any* protest, certainly one in which "there are unresolved factual issues." (See also Sec. IV, (a) and (b) of the Special Report.) As a result of the *Clarksburg* decision, legislation of an *enabling* rather than a clarifying nature is required to authorize Commission use of those recommended processes, so as to prevent private, competitive abuse of the protest procedures.

Following are drafts of proposed resolutions to implement approval of the Committee's Special Report:

Proposed Resolution for Section Consideration

BE IT RESOLVED that the Section of Administrative Law supports and endorses the proposed amendments to Section 309(c) of the Communications Act of 1934, as amended, as contained in pending bills S. 1648 and H.R. 5614 (84th Cong.), together with those further amendatory revisions of Section 309(c) recommended by the Committee on Communications, all relating to and designed to achieve elimination of present procedural abuses in the application of Section 309(c).

Proposed Resolutions for ABA Consideration

WHEREAS, administrative procedures should be so designed as to provide fair, effective and expeditious determination of rights and matters in issue and to effectuate the general public interest, and

WHEREAS, it is desirable and necessary that Section 309(c) of the Communications Act of 1934, as amended, be amended so as to eliminate insofar as possible the procedural abuses and infirmities infecting it to the end that its public interest benefits may be achieved in balance with fair and reasonable procedures for its effectuation, and

WHEREAS, the Federal Communications Commission has recommended for such purposes certain legislative amendments to Section 309(c) now contained in S. 1648 and H.R. 5614 (84th Cong., 1st Sess., 1955);

NOW, THEREFORE, BE IT RESOLVED, that so as to achieve the above-stated objectives the American Bar Association advocates and shall support the proposed amendment of Section 309(c) as found in S. 1648 and H.R. 5614, together with those other recommendations for amendment of Section 309(c) proposed by the Section of Administrative Law; and

BE IT FURTHER RESOLVED, that the Section of Administrative Law is hereby authorized and directed to represent the American Bar Association before appropriate committees of Congress, to the extent that such participation is deemed appropriate.

June 14, 1955.

SPECIAL REPORT ON S. 1549

(to amend the Communications Act of 1934 so as to authorize the imposition of administrative fines by the Federal Communications Commission for violations of its rules and regulations, and to authorize the remission or mitigation of such fines by the Commission)

The report of the sub-committee headed by Harold Cohen has been considered and adopted by the Section's Committee on Communications and it is submitted herewith with the recommendation that the Administrative Law Section oppose the enactment into law of S. 1549, 84th Congress.

S. 1549 seems to be lacking in desirable procedural safeguards to the persons affected thereby since it is premised on the theory of granting a hearing only *after* the penalty is imposed. The preferable procedure would appear to be that required by Section 312 of the Act in connection with the issuance of cease and desist orders, which follows the traditional approach of first granting an opportunity to the accused to be heard before there is any decision as to the imposition of a penalty or other sanctions. Moreover, the violation of a regulation of the Federal Communications Commission is a crime. Fines and imprisonment should better be left to jurisdiction of the courts. The proposal calls for double penalties and suggests the possibility of inconsistent decisions by the Commission and a court.

The power requested would also appear to impose a needless burden on licensees in establishing a system of fines and penalties, euphemistically called forfeitures.

When Congress in 1952 enacted amendments to Section 312 of the Communications Act to provide for the issuance of cease and desist orders by the Commission, it rejected a proposed provision for penalties in the nature of forfeitures. The Conference Report on this matter reads as follows:

> "Administrative Sanctions
>
> "Section 11 of the Senate bill proposed to rewrite section 312 of the Communications Act of 1934, and would have modified somewhat the grounds on which the Commission could revoke licenses and added new provisions authorizing the Commission to issue cease and desist orders in certain specified situations.
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> "The House substitute also proposed to rewrite section 312 of the present law. Among other things, it would have provided in most cases that revocation would be permissible only for acts willfully, knowingly, or repeatedly committed. In addition, *the modified section would have authorized,* for certain specified grounds or reasons, (1) suspension of station licenses for not to exceed 90 days, (2) revocation of construction permits, (3) *issuance of cease and desist orders, and* (4) *imposition of penalties in the nature of forfeitures.*
>
> *"The section as it is retained in the conference substitute is the same as the House amendment insofar as the grounds for revocation are concerned, but the provisions which would have authorized the Commission to suspend licenses or to impose forfeitures have been eliminated. It is believed that the authority to issue cease and desist orders will give the Commission a means by which it can secure compliance with the law and regulations by licensees.* As an alternative to revok-

ing the license in case of failure to obey a cease and desist order, the Commission will be able to invoke the aid of the courts, under section 401(b) of the act, to secure compliance. The courts will be able to enforce compliance through their power to punish for contempt." (Emphasis supplied.) (Conference Report on S. 658, House of Representatives Report No. 2426, 82nd Cong., 2d Sess., July 1, 1952, p. 20.)

It is, of course, more convenient and less cumbersome for an administrative agency to follow the "traffic cop" approach to enforcement of the law by making it easier for the party involved to pay a relatively small fine for the alleged offense, rather than assuming the burden of making a contest of it. A record of forfeitures is, however, quite a serious matter so far as a radio licensee is concerned, particularly when an application for a renewal of, or for an additional, license is in issue. It would thus appear undesirable for the administrative agency to be able to apply forfeitures by short-cutting the traditional procedures.

In this connection, it is of interest to note that under the forfeiture provisions proposed in S. 1549, the burden of obtaining a remission or mitigation of the forfeiture is apparently placed on the party subjected to the forfeiture (Section 504(b) of the Communications Act). In contrast, Section 312(d) of the Communications Act provides that in case of a hearing as to a proposed cease and desist order, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.

June 27, 1955.

Respectfully submitted,

COMMITTEE ON COMMUNICATIONS

ARTHUR W. SCHARFELD
Chairman

COMMITTEE ON EMERGENCY AGENCIES

The Committee on Emergency Agencies has held meetings to outline and pursue several lines of endeavor. For this work it has the benefit of national representation among its members.

It has initiated work on an examination of the impact of atomic attack within our own borders on administrative agencies and legal processes generally. While there is considerable current planning for industrial mobilization, and while increased emphasis is being placed upon industrial, civilian and governmental dispersion and evacuation, there has been, in the judgment of the Committee, insufficient attention paid to the legal consequences, including administrative agency problems, in the event major sections of this country are isolated or destroyed by atomic warfare. Such elementary problems as delegation of authority, regional and local authority for administrative agencies, and many other legal and administrative questions require attention. Since any thoroughgoing examination of the problem would go beyond the

jurisdiction of this Committee, and probably beyond the jurisdiction of the Section of Administrative Law, it was concluded as a first step that the Committee would outline: (a) the reasons for and the nature of the problem, as distinct from planning for industrial mobilization generally, (b) possible subjects of inquiry by the Committee and others, and (c) possible organization for examination by the Section and the Association, perhaps through a new committee of the Association that would include Section representation. Discussions with several Government agencies directly concerned have been pursued, and a review of the literature and past work in the field has been undertaken. A select bibliography is attached.

The Committee has given assistance to the Chairmen of the Section and of the National Committee in the Section's work and responsibilities for S. 490, 84th Cong. (formerly S. 18, 83rd Cong.; S. 1770, 82nd Cong.). The position of the American Bar Association on this and predecessor bills has frequently been stated, and need not be repeated here.* As an important corollary, the Committee believes that a discussion with several emergency agencies of the specific impact of the Administrative Procedure Act on their operations would be in order, for the purpose of determining whether any of the Act's provisions would, in fact, impair any of the agencies' functions, and if so, which and in what manner. There would thus be an opportunity to attempt, on an individual case-study basis, a realistic and factual examination of the effect of any or all of the provisions of the Administrative Procedure Act on any or all functions of given emergency agencies under different circumstances and states of emergency. The Committee is pleased to report genuine and constructive cooperation from important agencies in the field to such a joint examination, which will proceed without prejudice either to the Government's or the Association's position on existing or proposed legislation.

The Committee has given careful consideration to the Hoover Commission Report on Legal Services and Procedure and the accompanying Task Force Report, with particular emphasis on Recommendation No. 31 of the former and Recommendation No. 26 of the latter. A report on these recommendations is in process of being prepared.

Several other subjects have been considered, notably extension of the Defense Production Act, the possible addition of standby legislation for stabilization controls, current planning within Government agencies for emergency imposition and exercise of controls, and problems incident to the development of a roster of lawyers available in time of emergency.

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* [Ed. Note: The position of the Association, as stated briefly by the Section Chairman in letters to the Chairmen of the Committees on the Judiciary of the Senate and House in support of S. 490, is "that all existing general exemptions from the Administrative Procedure Act should be repealed and no further general exemptions enacted, and that, where the existing escape clauses of the Act are thought by an agency to offer an inadequate answer to its particular problem, the agency should seek exemption from specific provisions of the Act shown to be properly inapplicable in its particular field, rather than general exemption from the entire Act."]

As appears readily, many of these undertakings cannot be completed within the life-span of this Committee. Work will currently proceed in these areas and it is hoped that a good start can be made which successor Committees can and will wish to carry forward.

June 2, 1955.

Respectfully submitted,

COMMITTEE ON EMERGENCY AGENCIES

HANS A. KLAGSBRUNN
Chairman

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Anthony, *Hawaiian Martial Law in the Supreme Court,* 57 Yale L. J. 27 (1947).

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COMMITTEE ON GAS AND ELECTRIC POWER

The Committee on Gas and Electric Power was organized in the latter weeks of 1954 with entirely new membership consisting of eight members of the Section located in various parts of the United States. During the course of the year the efforts of the Committee were largely devoted to developing a number of subjects suitable for study and report which would be of current interest and value to the remainder of the Bar. It was not anticipated, in view of the recent reorganization of the Committee, that any final reports could be filed with the National Committee this spring. Meanwhile there have been assigned to this Committee for study portions of the Hoover Commission's recent report on Legal Services and Procedure, together with the more detailed report of its Task Force on Legal Services and Procedure. In addition to studying these reports, our Committee is undertaking a study of the proposed regulations of the Atomic Energy Commission with respect to its licensing program and their relationship to the Administrative Procedure Act. Other subjects under consideration are the rules adopted by the Federal Power Commission in its orders Nos. 174-A and 174-B in carrying out its functions under the Natural Gas Act with respect to independent producers and gatherers of natural gas and the orders' validity under the Administrative Procedure Act; and a study of Senator Douglas' Bill, S. 1248, to amend the Natural Gas Act so as to require that rates and charges be determined on an original cost basis.

It is hoped that the enthusiastic interest of the Committee already expressed in these topics will result in some reports during the coming year that will prove useful to the Association and can be filed for publication next spring.

June 1955.

Respectfully submitted,

COMMITTEE ON GAS AND ELECTRIC POWER

JAMES O'MALLEY, JR.
Chairman

OLCOTT D. SMITH
Vice-Chairman

COMMITTEE ON GOOD FAITH RELIANCE ACT

The Section's early activities regarding S. 1752, a proposal in the 83d Congress to establish good faith reliance as a defense in certain cases, are described in 39 A. B. A. J. 1111 (1953) and 6 Ad. L. Bul. 210 (1954). John Cragun, Clair Nelson, and Ashley Sellers supported the bill in principle in a Senate Judiciary Subcommittee hearing on July 1, 1954; and subsequent contacts with government officials included a meeting with members of the White House staff, attended by Robert Benjamin, Rufus Poole, and the Vice-Chairmen of this Committee.

During January and February, 1955, Committee members corresponded regard-

ing the desirability of revising S. 1752; and we then learned that the problem of good faith reliance had been considered by the Hoover Commission and its Task Force. Subsection 208(c) of the Task Force's Administrative Code reads as follows (as does § 208(c) of H. R. 6114, 84th Cong. 1st Sess.):

> GOOD FAITH RELIANCE.—No sanction shall be imposed by any agency for any act done or omitted in good faith by any person in conformity with, or in reliance upon, any rule, or any advisory letter, opinion, or other written statement of the agency addressed in writing to such person and obtained by him without fraud or material misrepresentation, notwithstanding the fact that, after such act or omission has taken place, such rule, or such letter, opinion, or other written statement is modified, amended, rescinded, revoked, or held invalid by the agency for any reason. Agencies shall by rule designate the classes of officials who are authorized to issue advisory letters, opinions, and other written statements upon which reliance may be placed.

The subsection is discussed on p. 417 of the Task Force Report (also see p. 225), and the more general comments of the full Commission appear on pp. 79-80 of its report to Congress.

Section members who are familiar with S. 1752 will see that Task Force § 208(c) differs significantly. For example, it protects a person only from agency-imposed sanctions; whereas S. 1752 covered court-imposed sanctions as well. It covers only those letters, opinions, and other statements that are addressed to a person; whereas S. 1752 covered also those addressed to the class of persons to which he belongs. And it permits agencies to cut off the protection without notice to the person; whereas S. 1752 required at least Federal Register publication. On the other hand, § 208(c) seems to proscribe all "sanctions", including even those needed to prevent a person's causing harm [e.g., in public health cases; cf. 53 Col. L. Rev. 374, 385]. And third-party rights seem to be cut off without any of the qualifications set forth in Sec. 1 of S. 1752.

These differences are now being considered by the Committee. If proposals for action by the Section are ready by August, they will be distributed then in mimeographed form.

June 2, 1955.

Respectfully submitted,

COMMITTEE ON GOOD FAITH RELIANCE ACT

FRANK C. NEWMAN
Chairman

JOHN T. FEY
HANS A. KLAGSBRUNN
Vice-Chairmen

COMMITTEE ON HEARING EXAMINERS

During the past year, the President's Conference on Administrative Procedure made its final report on proposals for the appointment of Hearing Examiners (Feb-

ruary 1955); several bills providing for the appointment and tenure of Hearing Examiners were introduced in the Congress; and the Commission on Organization of the Executive Branch of the Government (Hoover Commission) reported to the Congress in March 1955.

The President's Conference on Administrative Procedure

Prior to the final plenary sessions of the President's Conference, held October 14-15 and November 8-9, 1954, Committee members were asked to state their position with respect to whether the Civil Service Commission should retain responsibility for the Hearing Examiner program as recommended by the Lester-McElvain-Meloy-Scharnikow division of the Kintner Committee or whether the program should be administered by an independent Office of Administrative Procedure, as recommended by the Kintner-Doyle-Reynolds-Winings division of that Committee. Committee sentiment was that the position, as stated by the American Bar Association in the Atlanta Resolution, March 9, 1954, should not be varied. The President's Conference, after vigorous debate by its members and after its attention had been directed to the Atlanta Resolution by Charles B. Nutting, a member of our Council, voted in favor of retention by the Civil Service Commission of its responsibility for the Hearing Examiner program. This and other action of the President's Conference had been reported fully by Section Chairman Robert M. Benjamin in the December 1954 issue of the Bulletin, Volume 7, No. 1, p. 21.

Proposed Legislation

Representative Hyde and Senator Payne introduced similar bills (H.R. 29 and S. 1018). These bills would take from the Civil Service Commission all responsibility for the Hearing Examiner program and set up an Office of Administrative Procedure. Representative Celler introduced H.R. 4558, which would set up a new three member board within the Civil Service Commission, to be appointed by the Commission. To this board would be transferred the authority now held by the Commission with respect to the selection and qualification of Hearing Examiners. S. 2044, introduced by Senator Kefauver, is identical with the Celler bill.

The following analysis of and comments on the proposed legislation may be regarded as the thinking of a majority of this Committee but, as will appear, the Committee is by no means unanimous and strong dissents have been voiced.

The Payne Bill (S. 1018) and the Hyde Bill (H.R. 29).

These bills are considered together because they are almost identical, the Hyde bill being considered first inasmuch as the Payne bill is merely a rewriting of that bill, with some improvements and additions.

1. All incumbent examiners are "covered in".

2. Examiners are called "Administrative Judges".

3. Appointment is vested in an "Office of Administrative Procedure" and the only test is "character and fitness".

4. Salary is $14,000 per annum.

5. Tenure is permanent, Hyde providing for removal only for neglect of duty, or physical or mental disability and Payne adding "misbehavior". Hyde provides for removal proceedings in a District Court on charges by the Director of OAP while Payne, providing similarly, requires that the charges be upon the direction of the Commissioners.

6. Persons appointed will receive commissions as "Administrative Judges" from the OAP.

Comment:

(a) The advisability of the unqualified "grandfather" clause is questionable. The A.B.A.'s Atlanta Resolution was in favor of an "*appropriate* grandfather clause." In view of the questions raised with respect to a limited number of incumbents, perhaps there ought to be some qualification of the "covering in", such as perhaps a maximum continued tenure for a limited number of years with compulsory retirement, under the retirement system, if at that time found unqualified; or, specific reference to the removal procedure with adequate safeguards for hearing and review.

(b) The use of the title, "Administrative Judge", is unfortunate. Hearing examiners are not judges. From a practical viewpoint, prejudice against the use of the word "judge" could imperil any legislation.

(c) A single salary grade will relieve many tensions but whether there should be a single salary grade for all examiners in all agencies is subject to debate. It has been suggested that note be taken of the fact that the nature of cases and difficulty or complexity of work differs in different agencies and that recognition should be given to this by establishing two or three levels of compensation, within the discretion of the recruitment authority, but providing that compensation within an "agency" shall be uniform.

(d) The bills do not provide any minimum standards nor do they provide any safeguards for the merit system.

(e) The courts are not the place for the trial, in the first instance, of charges looking to the removal of administrative officers.

7. An independent agency, the Office of Administrative Procedure, is created.

8. The composition will be a Federal circuit judge, a government expert in federal administrative law, a member of an independent federal regulatory agency, a law professor and a practicing lawyer. Payne provides for nominal compensation to those not on the federal payroll (a Hyde omission).

9. The OAP will establish qualifications for the appointment of "administrative judges" and prepare a register of eligibles.

10. The OAP will appoint for the agencies the "judges" necessary to handle the business, giving regard to "technical" matters with which some agencies are concerned.

11. The OAP will set up rules for assignment of cases, hearing and disposition of cases and the administration of matters

coming "within the scope" of administrative judges.

Comment:

(a) A part time OAP will not be an effective operation and does not deserve to be called "an independent agency." The proposed organization would result in making the Director the agency and, in practice, the members would tend to or have to just "rubber-stamp" his actions.

(b) The organization and functions of an effective and valuable Office of Administrative Procedure, about which there has been talk for many years, should be the subject of specific and principal aim legislation and not collateral to or dependent on the legislation which deals with only one of the problems with which such an office should be concerned.

(c) For the same reason, the rule-making power is inappropriately conferred in these bills and the nature of the rules to be made as well as the scope thereof is haphazard and ill-defined. The OAP should not be permitted to control or interfere with the assignment of cases within or by an agency. This would take from the control of the agency the management of its business and vest it in another agency not concerned primarily with the functions of the agency whose case is to be considered. Also, what is meant by drafting rules for "the general administration of all matters coming within the scope of administrative judges"?

12. Hyde makes these administrative judges subject to the civil service retirement laws, gives them credit for prior employment but fails to require that they pay into the system for periods of prior employment if they have not already done so. Payne is silent and so life tenure, regardless of age, would result.

Comment:

Some requirement and provision for retirement are desirable and the civil service retirement laws governing other employees in the Executive branch of the government should govern hearing examiners.

13. The OAP is located at "the seat of government" and it is given a director and assistant director, who shall have the same tenure as "administrative judges" and whose salaries shall be $14,000. and $12,500. per annum. They are appointed by the OAP.

Comment:

(a) See (a) and (b) under items 7-11, above.

(b) A director who is given the discretion and power given to this director should receive at least two thousand dollars higher compensation than the "administrative judges".

14. Powers of the Director: Assign cases for hearing, supervise all "administrative matters relating to administrative judges", provide stenographic, clerical and legal personnel, "examine" the dockets of pending cases, prepare and publish statistics, determine and pay office expenses of administrative judges, regulate and pay travel, expenses and salaries, purchase and pay for all books, equipment, supplies, etc., of administrative judges, and provide accommodations for administrative judges.

Comment:

(a) See (a) and (b) under items 7-11, above.

(b) This is a tremendous, unnecessary and expensive establishment which will make the administrative process less efficient.

(c) The Director's power to assign cases for hearing would (as stated in comment (c) under items 7-11, above) interfere with the orderly management and control of the business of the agencies by the persons charged by law with that responsibility.

(d) The principle of "rotation of cases" seems to be abandoned.

(e) What is meant by "legal personnel"? Are examiners to have their own legal assistants? Who, then, will be doing the work and deciding the cases?

15. Cases must be forwarded within 30 days to the Director of OAP by the agencies and, if not forwarded, any party may file them with the Director. They are then assigned to an "administrative judge" and may not be returned to the agency unless so ordered by him.

Comment:

(a) See comments (a) and (b) under items 7-11 and (c) under item 14, above.

(b) The agencies are relegated to a second-class position alongside of the "administrative judges" who, by tradition and function, should be only aides of the agency to enable the agency to perform the vast amount of work required of it by law by having the cases digested for it by these officers.

16. The conduct of cases shall be in accordance with rules promulgated by the OAP and as far as practicable subject to the Federal Rules of Civil Procedure.

Comment:

(a) See comments (b) and (c) under items 7-11, above.

(b) Also see parts 5 and 6 of Recommendation E of the President's Conference on Administrative Procedure which suggest the attainment of uniformity in rules, so far as is possible, after collaboration of the agencies, the bar and the OAP.

17. Travel maintenance expenses not exceeding $15. per day are provided.

Comment:

This seems proper.

18. Subpoena powers equal to those of the agency whose matter is being considered and the power to order the taking of depositions, equivalent to the power of a district judge, are given to the administrative judges.

Comment:

(a) To restrict the subpoena power to that of the particular agency whose matter is being considered seems inconsistent with the other very broad powers assigned to the OAP in derogation of the present powers of the agencies.

(b) The power to order the taking of depositions is subject to the same comments as in (b) under items 7-11, above.

19. The agency must "accept the findings of fact of" the administrative judges

"unless such findings of fact are clearly erroneous".

Comment:

The language used here seems to be stronger than that used in Rule 52, F.R.C.P. While the general objective is good, the words used should be more in conformance with the opinion of the United States Supreme Court in *U. S.* v. *Gypsum Co.,* 333 U. S. 364, 395, with due consideration to the principles laid down in *Universal Camera Corp.* v. *N.L.R.B.,* 340 U. S. 474, 492. If the agency "is left with the definite and firm conviction that a mistake has been committed" upon the basis of the whole record, even if there is some evidence to support the finding of fact of the hearing officer, it should have the power to make other and different findings of fact based upon the evidence in the record.

20. Part "(C)" of the Hyde bill and Section 3 of the Payne bill provide implementation for these bills and also for transfers of funds, personnel, etc., from the agencies to the OAP.

Comment:

In view of the comments above, no comment is necessary here.

The Celler Bill (*H.R. 4558*)

This bill seeks to conform, to some extent, the present Section 11, A.P.A., to Recommendation C of the President's Conference. The Conference recommended that the Civil Service Commission establish a five person "Bureau of Hearing Examiner Administration, charged with the responsibility for the hearing examiner program."

1. This bill sets up a three member board, within the Commission, to be appointed by the Commission, upon staggered terms, ultimately resulting in five year terms. No more than two members of the board may be of the same political party, all shall be lawyers experienced in practice "before or with or as members or examiners of agencies" subject to the Act or as judges of courts of record and not more than one may be from the staff of the Commission. Their compensation is fixed at GS 18. The previous authority of the Civil Service Commission is transferred to this board.

Comment:

The Board of Examiner Administration is a step towards lessening the criticism which the Civil Service Commission's administration of the program engendered. It is, nevertheless, within the Civil Service Commission and, being appointed by the Commission and inheriting or obtaining all its staff from the staff of the Commission, can be expected to follow traditional methods employed by the Commission. This is not consistent with the Atlanta Resolution of the American Bar Association.

Experience has demonstrated quite conclusively that lawyers and examiners may not be rated and judged by the usual or rule of thumb methods current in ordinary personnel recruitment. The subjective factors necessary to be found in a good examiner are too many and too varied to make their determination susceptible of numerical ratings and arbitrary standards or formulae. The Civil Service Commission's investigators do not

have the training or knowledge necessary to judge fairly or appraise properly the qualifications of applicants for hearing examiner positions.

2. Removal of Examiners: This bill is more explicit than Payne's or Hyde's and sets forth as grounds for removal "malfeasance, neglect of duty, physical or mental disability or . . . reasons of national security established and determined by the Board of Examiner Administration after opportunity for hearing and upon the record thereof". The Board is given the power of removal and there are two avenues of appeal—directly to a United States Court of Appeals or to such a court after appeal to the Commission.

Comment:

(a) The grounds seem good.

(b) The alternate of initial appeal to the Civil Service Commission is not advisable because it perpetuates the Commission's control over incumbent examiners and may give rise to a situation such as that which resulted after the Commission's first board of consultants found a number of examiners ineligible. It gives incompetents an opportunity to cause pressure to be exerted on the Commission to reverse the order of the Board.

3. Compensation is fixed at GS 18.

Comment:

This is the single grade idea. See comment (c) under items 1-6 above regarding the Payne and Hyde bills.

4. "Grandfather" clause.

Comment:

(a) See comment (a) under items 1-6 above regarding the Payne and Hyde bills.

(b) The removal powers could be regarded as compensating to some extent the unqualified "grandfather" clause.

5. Board is given power to adjudicate finally complaints filed by litigants before the agencies and examiners "relating to preferential or prejudicial assignments to cases".

Comment:

Why this provision is contained in the bill is difficult to understand. It makes an internal board of the Civil Service Commission a "super-agency" to which *litigants* may appeal, in the instances cited, from the rulings of agencies. This is a strange, new procedure and it can be assumed only that the draftsman really intended to provide for appeals by *examiners* from preferential or prejudicial assignments of cases to them or to other examiners by the agencies.

6. Board members' salaries are fixed at GS 18.

Comment:

This is the same grade assigned for hearing examiners. See comment (b) under item 13 regarding the Payne and Hyde bills.

Conclusion

None of these bills in their present form should be favored.

With respect to the foregoing study of the Hyde, Payne and Celler bills, Clifford R. Stearns, while agreeing with the conclusions, says that as a practical matter, since the Celler bill would be easier of passage

than the other two, he would favor it. Edmund M. Brady says the remedy does not lie in new legislation and new reports but rather in giving the agencies sufficient funds to perform their functions. Daryal A. Myse, while concurring, would strengthen the position of the hearing examiners as opposed to the comment in item 15 regarding the Payne and Hyde bills and believes that the proposed language to which objection is made in item 19 is necessary. Frank A. Constangy concurs except that he is opposed to any grandfather clause. Elizabeth C. Smith says, "Please note my dissent to the views expressed . . . I am not prepared to state that either of the pending bills is the proper solution to the problem . . . . However, . . . (the) proposed comments on these bills do not necessarily coincide with my thinking on them in any degree because I am in diametrical opposition . . . on most of the points." J. Edgar Snider dissents "to all expressions and conclusions or comments." F. Merritt Ruhlen dissents from comment (a) under items 1-6 regarding the Payne and Hyde bills, contending the grandfather clause should be unqualified, partially dissents from comment (c), saying all examiners should be of one grade or at least of one grade in each area of competition within an agency, dissents from comment (e) under item 14, contending that examiners should have the assistance of legal personnel, and qualifies his concurrence in comments (a) and (b) under items 7-11 by favoring contempt powers for examiners and agencies. He dissents from comments 1, 2(a) and 5 with respect to the Celler bill but believes, with respect to item 5, that its applicability should be limited to complaints of examiners. Richard N. Ivins favors the Hyde and Payne bills and opposes the Celler bill. He says that any objections to details in the Payne and Hyde bills can be worked out in Congressional committees. Messrs. J. Earl Cox, Snider and Stearns and Miss Smith, in a joint statement, say with respect to these bills, "None embody all the ideal features that are desirable but (with the exception of the Celler bill which should be defeated) they contain embryonic ideas and purposes which, through Congressional study, could be converted into legislation that will constitute a landmark in administrative law progress."

Hoover Commission and Task Force Recommendations

The Committee has not had adequate time to study and report on these recommendations. Some members have submitted their views and, because these views may stimulate thinking and discussion, they are reported here. This portion of the report, it is emphasized, is not the considered judgment of the Committee or a majority thereof and, as stated, represents only individual thinking.

A memorandum has been received from William R. Ringer and a copy distributed to each member of the Committee. Highlights are, ". . . The abolition of . . . Trial Examiners (of the N.L.R.B.) would merely remove their function to other individuals called commissioners . . . . The whole document is born of a desire to eliminate (specialization) . . . from our jurisprudence . . . . The N.L.R.B.'s Trial

Examiners would be 'removed', save for any the Board might retain for representation cases. They would be supplanted by Court Commissioners of the Administrative Court. Any adjudicatory functions remaining to the agencies would be heard by hearing commissioners, appointed by a Chief Hearing Commissioner and approved by an Advisory Committee. Thus all incumbent hearing examiners would be subject to replacement . . . . A candid appraisal of the specific language in the Task Force report for the implementation of the 'appointment' of a corps of hearing commissioners, to be found in Sec. 503 of the proposed 'Administrative Code' (T.F.R. 382), makes it obvious that under such legislation no present examiner would secure a 'permanent appointment' as a hearing commissioner until he had been found qualified by both the Chief Hearing Commissioner and by a majority of the five-member Advisory Committee . . . . All examiner positions under Sec. 11 of the A.P.A. are to be 'terminated' . . . . In short, the Code, as further explained by the Task Force report (T.F.R. 422), would protect an incumbent A.P.A. examiner with an immediately preceding year's service only to the extent that he may serve temporarily at no increase in compensation, until he has an 'opportunity', ahead of those not presently in the hearing examiner corps, to go through the double sifting process of nomination by the Chief Hearing Commissioner and approval as qualified by majority of the Advisory Committee . . . . The effect of the foregoing provisions is to remove federal personnel from the career service, transfer executive department functions to private persons, create additional federal apparatus, increase expenditures, and provide opportunity for manipulation, by political and private interests, of appointment and advancement of hearing and court commissioners . . . . Court Commissioners would have no tenure whatever under the proposed Administrative Code. Only senior Hearing Commissioners would have permanent tenure. The remainder of the hearing commissioners would be subject to re-appointment after 8 years and thus perhaps sensitive to possible temperament and bent of the Chief Hearing Commissioner and the Advisory Committee, Administrative Court or Council . . . . The Chief Hearing Commissioner may be politically-minded in his nomination of commissioners. The Advisory Committee, in turn, is subject to the possibility of illegitimate persuasion. The non-governmental members will be representatives of private interests affected by agency action. The propriety—not to mention the constitutionality—of an arrangement involving direct participation by private affected interests in the selection and promotion of government personnel, as distinguished from the establishment of standards for employment, is open to question . . . . It seems an extraordinary concept that it should be inappropriate for a public agency sworn to administer public law to have authority over its personnel conducting hearings for the reason that the agency is 'interested in the outcome,' yet on the other hand be appropriate for litigants or their counsel to participate in the selection or disapproval of such personnel."

Messrs. Cox, Snider, Stearns and Miss

Smith, in the same joint statement mentioned above, say, "We think the American Bar Association ought to support the principles embodied in the recommendations of the Hoover Commission Task Force and work with Senate and House Committees to implement them . . . . We believe that if an Administrative Court is established all adjudicative functions now exercised by the agencies should be transferred to that court . . . . On principle, we believe that all judicial functions should be transferred to the Judicial Department of the Government and, therefore, we support the recommendations of the Commission and the Task Force with respect thereto . . . . We believe, therefore, that the practical solution of the problem is to transfer those hearing officers who hear adjudicatory cases to the supervision and direction of the Administrative Office of the United States Courts . . . . We feel that the phrase, 'to the extent practicable,' weakens the (Commission's) recommendation 41b . . . ."

Frank B. Hand Jr. approves most of the comments made by the Smith group but states that Recommendation 51 of the Commission is not clear "as to what functions of the various commissions should be transferred to" the administrative court. He says also, "There could be considerably more delay in obtaining final decisions under the proposed procedures than we have at the present time and this seems to me to be an important factor that should be given some consideration."

Ruhlen, with respect to Recommendation 41, says hearing examiners should be given contempt powers and that the examiner or the agency or both should have the right to enforce subpoenas.

John G. Clarkson says, "The entire administrative function does not, by reason of having reached a hearing stage, change the nature of the activity from executive to judicial . . . . I would disagree with the statement that a hearing officer should have authority comparable to that of trial judges." With respect to Recommendation 52, he says, "Complete independence is probably not possible and possibly not desirable . . . (but) . . . hearing officers and their supervisor (should) be as free as possible with respect to the independent exercise of their talents in the exercise of the quasi-judicial function."

Task Force Bills

Representative Thompson introduced H.R. 6114 and 6115, identical with Task Force drafts of an Administrative Code and Legal Services statute, except that H.R. 6114 adds an additional section, Sec. 209, providing for review of dismissals from Federal employment for loyalty or security reasons. These bills have not yet been considered in detail by the Committee.

During the course of the year Committee members were furnished, immediately upon publication, with the report of the President's Conference, all the bills mentioned, the Hoover Commission's recommendations and the Ringer memorandum. The Chairman desires to point out that the percentage of members of this Committee who participated actively in the work of the Committee was extremely gratifying.

Yet, of those who participated actively, members who are Hearing Examiners constituted a larger ratio. As to those members who were merely acquiescent, private practitioners and those who are not Hearing Examiners were in the majority. He therefore recommends that, when the Committee is reconstituted for the coming year, because of the importance of its work, before any member is appointed it should be ascertained by specific inquiry whether it is his intention to participate actively.

June 15, 1955.

Respectfully submitted,

COMMITTEE ON HEARING EXAMINERS

HERMAN TOCKER
Chairman

COMMITTEE ON IMMIGRATION AND NATURALIZATION

There have been referred to this committee for study and recommendation S. 519, 84th Cong., hereinafter called the Ives Bill, and S. 1206, 84th Cong., hereinafter called the Lehman Bill. The Committee has also examined S. 1315, 84th Cong., introduced by Senator Humphrey. Those bills cover many substantive as well as procedural aspects of immigration and naturalization. The Lehman Bill in particular is a substitute for the present Walter-McCarran Act and is a complete code of immigration and naturalization. The Committee has attempted to restrict itself to procedural aspects and in particular to things which are characteristically administrative. The line, however, between procedure and substance is a notoriously uncertain one and we have not always been able to draw it clearly.

Board of Visa Appeals

Both the Ives and Lehman Bills provide for a Board of Visa Appeals to be established in the Department of State. The present procedure relating to a request for a visa is as follows:

The application is submitted to the consular officer in the place where the alien lives. If the consul grants the visa his decision may be reversed by higher authority in the Department of State, or the alien when he arrives in this country may be denied admission by the Immigration Service of the Department of Justice. If, however, the consul denies the visa, his action is final and cannot be reviewed by any other officer or authority. Thus each and every consul is in denying a visa a law unto himself. It is difficult to find any other situation in our whole administration in which so crucial a power is lodged in the initial operating officer beyond any possibility of review. This would not seem to be consistent with the general principles upon which power is exercised in our system. It encourages the arbitrary and irresponsible exercise of power. It has also been pointed out that in a case of doubt the consul is taking the least risk in denying the visa and thus important interests may be denied legitimate protection. It should be noted at this point that the interest in

the question is not simply the interest of the alien, but in a great many cases is the interest of someone in this country—it may be a relative—who is seeking to promote the immigration. For these reasons the Committee concludes that the proposal to establish a Board of Visa Appeals in the Department of State is a sound one and that the Association should record its approval of the proposal.

The Lehman Bill provides for a unified administration of all immigration matters in a newly organized bureau. Under such an administration, visa appeals would be one of the heads of jurisdiction. Though such an organization would have many advantages the Committee believes that a recommendation for a Board of Visa Appeals should not be made to wait for that eventuality.

Resolved that the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

> "Be it Resolved that it is the opinion of the American Bar Association that there be established a Board of Visa Appeals with power to review the denial by a consul of a visa and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end."

Exclusion Without Hearing In Security Cases

Under Section 235(c) of the present Act an alien may be excluded without hearing if the Attorney General concludes that he is excludable on the basis of information of a confidential nature, the disclosure of which would be "prejudicial to the public interest, safety or security." Section 204 of the Ives Bill provides for the outright repeal of this section. Section 304 of the Lehman Bill seeks to restrict it. It provides that the exclusion of an alien can be ordered only on a record adduced at a hearing; but the Attorney General may refuse the disclosure of evidence which would "seriously impair the usefulness of reliable and important sources of confidential information or would adversely affect the safety or security of the United States."

The Committee approves Section 304 of the Lehman Bill. It believes that an alien should not be excluded without a hearing. On the other hand it believes that in security matters the United States should be able to preserve the usefulness of its sources of confidential information. It believes, therefore, that Section 204 of the Ives Bill goes too far in proposing an outright repealer of the present Act.

Resolved that the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

> "Be it Resolved that it is the opinion of the American Bar Association that an alien should not be excluded except upon record evidence taken at a hearing, but that proper provision be made in security cases for safeguarding the sources of confidential information and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end."

Application of the Formal Hearing Requirements of the APA

Under the present law hearings are conducted not by officers appointed under the APA but by special inquiry officers who are under the supervision of district directors of the Immigration Service, as well as higher Service officials; these supervising officials have enforcement responsibilities of the type proscribed by Sec. 5(c) of the Administrative Procedure Act. It has been recently held by the Supreme Court in *Marcello* v. *Bonds* that the hearings under the Immigration Act are governed by that Act to the exclusion of any otherwise relevant sections of the APA (such as Secs. 5, 7, 8). The Lehman Bill provides that hearings shall be conducted by officers appointed under the Administrative Procedure Act in accordance with all the applicable provisions of that Act. The Bar Association has already taken a similar position and therefore it would seem that the enactment of these provisions should be once more recommended by the Bar Association.

Resolved that the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

> "Be it Resolved that it is the opinion of the American Bar Association that in all alien matters in which an administrative hearing is required to be had by statute or the Constitution, the hearing officer be duly appointed under Section 11 of the Administrative Procedure Act and be governed by all the relevant provisions of Sections 5, 7 and 8 of that Act."

Proceedings for Declaration of United States Citizenship

Under the Nationality Act of 1940 any person claiming nationality whether within or outside of the United States could bring a judicial proceeding to determine his claim. This Act was repealed by the Nationality Act of 1952 and the right to bring such a proceeding restricted to persons within the United States and a limited group of persons outside the United States; and such persons' right to appear personally in the proceeding depends upon the issue by a diplomatic or consular officer of a certificate of identity. The consequences are three: (a) some persons outside the United States may not be able to secure any determination of their claim. Compare *Tom Mung Ngow* v. *Dulles,* 122 F. Supp. 709 (D. D. C. 1954); (b) a person entitled to bring the proceeding but unable to secure a certificate of identity may be unable successfully to present the case; (c) a person subject to an exclusion order can secure review probably only by habeas corpus, in which proceedings he cannot secure a de novo determination of the issue of citizenship.

Section 455 of the Lehman bill provides for a judicial proceeding in every case in which a claim of citizenship is made; and the Court rather than the administrative agency determines whether a certificate of identity shall issue to a person outside of the country. This restores the law more or less as it was under the Act of 1940. In the opinion of the Committee the issue of citizenship is too basic to be given any less protection than that proposed in the Lehman Bill.

Resolved that the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

> "Be it Resolved that it is the opinion of the American Bar Association that any person whether within or without the United States who claims to be a national shall be entitled to a judicial determination of his claim, and where a Court finds that the action is instituted in good faith and has a substantial basis, he shall be entitled to a certificate of identity to enable him to appear in person in such proceeding, and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end."

Judicial Review

The Ives Bill proposes that in any exclusion or deportation case after the entry of a final order, an alien may seek judicial review under Section 10 of the Administrative Procedure Act or under the Declaratory Judgment Act. The Lehman Act provides that any final order issued under the Act except orders with respect to the denial of visas shall be subject to judicial review within 60 days, etc. These two sections have more or less the same principal objective. At the time when these sections were drafted it appeared that the only method of review of deportation or exclusion orders was by habeas corpus. Thus a person affected by such an order could not secure a determination of its legality unless and until he was taken into custody. In *Heikkila* v. *Barber,* 345 U. S. 229, it was decided that the APA did not provide a method of review in addition to the habeas corpus procedure. The primary object of the proposed sections was to remedy this lack. It will be recalled that the Association has already recognized the injustice of this situation and last year endorsed in principle a Department of Justice bill providing for direct judicial review. This bill was never passed. The bill, however, applied only to deportation and not to exclusion orders. Normally an excluded alien will be in custody at the port of entry and the habeas corpus procedure will provide an adequate remedy. If, however, an alien is seeking entrance at a land port as from Canada or Mexico, this is not the case, and there is considerable doubt whether such an alien has any effective judicial remedy. Both these proposals were meant to remedy these lacks in the law.

Recently, in *Shaughnessy* v. *Pedreiro* it was decided that a deportation order could be reviewed in the district courts under Section 10 of the APA by declaratory judgment procedure. The *Heikkila* case was distinguished on the ground that under the Walter-McCarran Act of 1952 it was intended that the review provisions of the Administrative Procedure Act should be available. The decision does not, of course, make clear whether the same ruling would be made in an exclusion case. Most of the reasoning would be applicable to an exclusion case. However, Section 360 of the Walter-McCarran Act limits review to habeas corpus in some instances of exclusion. These are cases where a person claims to be a citizen, has secured a certificate of identity and while in possession thereof has applied for admission to the United States at a port of entry. In such cases, if the applicant is excluded he is lim-

ited on review to habeas corpus. But is habeas corpus available to him if he seeks to enter from Canada or Mexico? And does this provision apply to persons who are admittedly aliens but claim improper exclusion?

The proposed legislation would clarify these questions and make explicit provision for a declaratory judgment in such cases. In the light of the decision in the *Pedreiro* case the proposal of the Ives Bill would appear to be superior to that in the Lehman Bill. Under the *Pedreiro* case the proceeding may be brought at any time and in the district in which the order is made. Under the Lehman Bill there is a limit of sixty days and the proceeding must be brought in a Court of Appeals. In the view of some members of the Committee the present situation is a tolerable one and it would do no harm to await its further explication by the Court.

Statute of Limitations for Deportability

Under the present law an alien may be deported for cause (a) no matter how many years he has been in this country, (b) no matter how young he was when he first came into the country and (c) for crimes, offenses and violations of the law no matter how long ago committed. Both the Ives and Lehman Bills have provisions qualifying in one way or another this complete lack of limitation on the time of commencing deportation proceedings. The Committee was not prepared to commit itself to the precise terms of either bill. The Ives Bill, for example, provides that "no alien shall be deported by reason of any conduct occurring more than ten years prior to the institution of deportation proceedings." Some members of the Committee believe that this provision is too sweeping. Nevertheless, the Committee was unanimously of the opinion that the principle of limitation should be given recognition and that the present statute gives rise to quite unnecessary injustices in particular cases. The same general principle should apply to the revocation of citizenship.

Resolved that the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

> "Be it Resolved that it is the opinion of the American Bar Association that there be appropriate recognition of the principle of the Statute of Limitations in matters of deportation and revocation of citizenship, and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end."

June 1955.

Respectfully submitted,

Committee on Immigration and Naturalization

Louis L. Jaffe
Chairman

Benjamin G. Habberton
Jack Wasserman
Vice-Chairmen

COMMITTEE ON IMPROVEMENT OF ADMINISTRATIVE PROCEDURES

House of Delegates Resolutions Proposed

The Committee on Improvement of Administrative Procedures recommends to the Section of Administrative Law that it propose to the House of Delegates the following resolutions:

1. Be it Resolved that the American Bar Association, despite its expressed belief that hearing officer personnel functions should not be performed by the Civil Service Commission as recommended by the President's Conference on Administrative Procedure, expresses its gratification over the completion of the work of the Conference, which was called partly at the instance of the Association, and the collaboration through the Conference of agency representatives, trial examiners, and members of the bench and bar which has produced significant proposals for the further improvement of federal administrative procedures. The Association will welcome similar collaboration in the future, especially with reference to the further development of uniform rules of procedure as suggested in Recommendations E-5 and E-6 of the Conference. Specifically, the Association would welcome the early inauguration of meetings of bar representatives and representatives of certain agencies for the perfection of certain rules governing formal proceedings, and the Association stands ready to appoint representatives to participate in such meetings. The Association believes that representation of the bar should be relatively greater in future joint conferences and meetings than was the case in the President's Conference.

2. Be it Resolved that the American Bar Association advocates the prompt establishment of an Office of Administrative Procedure, or of Legal Services and Procedure, in the Federal Government independently of any government department. Without prejudice to the possible desirability of the performance of additional functions by an Office of this nature, as recommended by the Commission on Organization of the Executive Branch of the Government and by unofficial groups, the Association believes the Office should have the duties stated in paragraph (a) of Recommendation A-1 of the President's Conference on Administrative Procedure. If there are any budgetary or other reasons which would prevent early establishment of an independent Office of Administrative Procedure, the Association would not oppose the immediate establishment of the Office in the Department of Justice with an express proviso that the Office is made part of the Department as an interim measure only, until it becomes possible to establish an independent Office.

Section Resolutions Proposed

1. The Section of Administrative Law endorses the following procedural recommendations, made by the President's Conference on Administrative Procedure to the agencies, with the qualifications noted: E-1, generally recommending the elimination of unnecessary delay, expense and volume of records; E-7-9, relating to prehearing and other conferences and to definition of issues, except that the Section is doubtful of the extent to which defini-

tion of issues can be achieved by means of pleadings in complicated proceedings; E-10 and E-11, relating to the submission of documentary evidence in advance and the identification and distribution of copies of excerpts from documents; E-12, relating to the limitation of expert or opinion testimony, except that the Section believes this recommendation should be limited to expert, as distinguished from ordinary opinion, testimony and that authority should not be bestowed upon trial examiners to compel written submission of "expert testimony and all direct testimony based on economic or statistical data" in all proceedings without further study, even when permissible under the Administrative Procedure Act; E-14, relating to authority in hearing officers to rule upon interlocutory matters which arise during the course of hearings, with interlocutory appeals reduced to a minimum. The Section also welcomes Recommendations E-20-22, which suggest agency action to furnish practice manuals to counsel, to cooperate in institutes or courses in specialized fields of administrative law, and to sponsor conferences with members of the bar.

2. Be it Resolved that the Section of Administrative Law endorses Recommendation A-2 of the President's Conference on Administrative Procedure, urging the adoption of legislation to authorize the filing of abbreviated records with the United States Courts of Appeals in proceedings to review agency orders. The Section also endorses Recommendation B-2 of the Conference urging the several United States Courts of Appeals to adopt a uniform rule permitting the filing of abbreviated records in such proceedings where existing statutes permit, together with Recommendation B-3 which urges the several United States Courts of Appeals to adopt a uniform rule, applicable to review of agency orders, providing for the filing of briefs prior to the printing of a jointly printed appendix.

3. Be it Resolved that the Section of Administrative Law endorses Recommendations C-7, D-1 and E-16 of the President's Conference on Administrative Procedure, relating to improvement and economy in the methods of reporting, recording, monitoring and transcribing the records of administrative hearings and the development of a general policy to assure prompt availability of transcripts to interested persons at a fair cost; but the Section recommends in addition that provision be made to furnish a transcript without charge to any party directly affected by any agency proceeding who establishes that he is unable to pay therefor without undue hardship, with the agency paying the cost thereof out of money appropriated for that purpose where the transcript is being prepared by contract reporting.

4. Be it Resolved that the Section of Administrative Law endorses Recommendation E-17 of the President's Conference on Administrative Procedure, seeking uniformity in the printing and identification of agency rules through adoption in all official publications and citations of the title and subdivision designations appearing in the Code of Federal Regulations.

The Work of the Committee

The Committee on Improvement of Administrative Procedures has directed its attention during 1954-55 largely to the

work of the President's Conference on Administrative Procedure, which rendered its Final Report on April 29, 1955, two years after the Conference had been called by the President. That report contains recommendations to the President, the Judicial Conference, the Civil Service Commission, the General Services Administration, and the various administrative agencies of the Federal Government. Some of these were contained in a First Report of the Conference, made one year previously, upon which this Committee commented in its 1953-54 report. The views there stated are incorporated here by reference.

The Committee has undertaken the principal portions of its task through subcommittees which have given attention to the recommendations of the President's Conference and the other matters covered and have rendered reports with regard to them. These subcommittees have dealt with the following subjects: Office of Federal Administrative Procedure; Uniform Rules of Practice; Pleadings and Prehearing Conferences; Evidence and Interlocutory Matters; Legal Services, Transcripts, and Judicial Review; Informal Adjudication; and Rules and Rule-Making. The recommendations herein made are based on these reports, which will be filed herewith in the records of the Section. Subsequent interchange of views among members of the Committee has taken place by correspondence. It is too much to expect that each of the twenty-eight members of the Committee agrees in detail with all of the points covered in this report; but the views stated represent, nevertheless, a genuine consensus.

The Committee has considered the rule-making provisions of H. R. 833, 84th Cong., which would amend Section 41 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 941, by authorizing the Secretary of Labor to enforce and administer the provisions of the section and to issue rules and regulations for the prevention of accidents and occupational diseases in every employment or place of employment covered by the Act, except that his authority would not extend to changes or modifications of a ship's hull, superstructure, and fixed and running gear. The Secretary's regulations would be enforceable by fine or imprisonment for misdemeanor; but he would have authority to grant variations because of practical difficulties or unnecessary hardships. The bill as drafted raises questions concerning the breadth of the authority conferred and the application of the rule-making provisions of the Administrative Procedure Act. If the bill comes under active consideration, the Section should be prepared to advocate suitable provisions covering those points; but it seems unnecessary to include detailed recommendations is this report.

The subcommittee on informal adjudication, through its chairman, has held meetings with officials of the Bureau of the Budget, looking toward assistance by that agency in securing agency cooperation in a study of informal adjudicative procedures. It was decided that no action should be taken until the results of a study by the Committee on Organization of the Executive Branch were available. This matter should be pursued further during 1955-56.

The Hoover Commission Report

The Commission on Organization of the Executive Branch of the Government has recently rendered its report on Legal Services and Procedure which touches on many of the same points as the report of the President's Conference. It has not been possible for this Committee to consider the report of the Commission in connection with this report, except as it bears on the desirable location of an Office of Administrative Procedure, or an Office of Legal Services and Procedure as it is called in the Commission's report. The pertinent recommendations of the Commission will be given attention and may result in further recommendations to the Section. It is believed, however, that these will not conflict with any of the recommendations and suggestions herein made.

Statement as to Proposed Resolutions

A. *House of Delegates Resolutions*

The first of the two proposed House of Delegates resolutions is recommended because a response by the American Bar Association to the Final Report of the President's Conference seems desirable and the one proposed states, we believe, the answer that should be given to that report as a whole. The process of collaboration between agency representatives and members of the bar, which the Conference carried forward, is one which produced valuable results through the Conference and should not be allowed to lapse. The Conference contained 12 members of the bar in addition to 3 federal judges, 3 trial examiners, and representatives of 57 federal administrative agencies. It was generous in supplying preliminary material as well as copies of its reports to the Section of Administrative Law of the Association and it continuously sought the views of individuals and groups among the practicing bar. The proposed resolution expressing frankly the Association's position would, if adopted, give impetus to such collaboration in the future. The desirability of adopting the resolution is not affected, we believe, by the possibility that legislative reform of administrative procedure may, as a result of the Hoover Commission and Task Force reports on Legal Services and Procedure, alter the procedural problems that will require attention.

The Section of Administrative Law should, on behalf of the Association, consider the detailed procedural recommendations of the President's Conference. This it can properly do by virtue of the authority conferred upon it by the House of Delegates to take steps to preserve the gains made in the Administrative Procedure Act and to develop and seek the adoption of further improvements. The House of Delegates should, however, be asked to lend its express sanction to Association effort in major matters, so as to secure its judgment and bring its influence to bear. The overall response to the President's Conference falls in this category. So, also, do the questions surrounding the establishment of an Office of Administrative Procedure in the Federal Government, with which the second proposed resolution deals.

The second resolution is recommended for two principal reasons: (1) the time is ripe for the establishment of the proposed

Office and (2) we believe the Association should adopt and state the view that the Office should be an independent agency of the government. Recommendation A-1 of the President's Conference and the Hoover Commission and Task Force reports advocate the establishment of an Office having research, advisory, and coordinating functions with respect to problems of administrative procedure. They would, however, establish the Office in the Department of Justice. The Office of Legal Services and Procedure, recommended by the Hoover Commission, would perform additional services and would have mandatory authority with respect to certain agency practices. There has also been advocacy of the performance of hearing-officer personnel functions by an Office of Administrative Procedure if one is established. These matters are not involved in the proposed resolution.

The long history of the movement for an Office of Administrative Procedure is sketched in the Comments on Recommendation A-1 of the President's Conference. Reasons in support of the establishment of such an office are stated there and at pages 82-84 of the Hoover Commission Report on Legal Services and Procedure, as well as in the report of the Task Force on the same subject. These reasons need not be repeated here, but it is safe to say that continuous progress in the improvement of federal administrative procedures rests more largely on the adoption of this measure than on any other step that could be taken. The importance of this recommendation to the bar is correspondingly great.

The reason assigned by the President's Conference for recommending that the Office be established in the Department of Justice is that, for reasons of economy, it should use the administrative or housekeeping services of an existing agency. The Hoover Commission and Task Force take the same position, along with the view that since procedural problems are essentially legal they fall naturally to the Department of Justice. The extent of the possible savings is not indicated. It would not appear that such savings would offset the substantial reasons for having an independent Office. These are that the Office should be regarded as a general staff agency, rather than one falling within the province of a department charged with carrying out laws in an executive capacity and defending existing procedures in court; that it should be removed as far as possible from political pressures; and that its administrative head should be in a position to deal directly, rather than through a cabinet officer, with agencies to which its procedural recommendations relate. Nevertheless, it is supremely important that the Office be established soon. For this reason the proposed resolution acquiesces in the temporary location of the Office in the Department of Justice if certain specified considerations preclude prompt action otherwise.

B. *Section Resolutions*

The reasons in support of the proposed Section resolutions are apparent from their text, taken in conjunction with the Report of the President's Conference. Hence the Committee will not burden this report and

the pages of the Section's Bulletin with further elaboration. Oral discussion at the Section meeting should be sufficient to clear up any doubtful points.

June 1, 1955.

Respectfully submitted,

COMMITTEE ON IMPROVEMENT OF ADMINISTRATIVE PROCEDURES

RALPH F. FUCHS
Chairman

JOHN C. PIRIE
Vice-Chairman

Additional Statement of Committee Members Regarding Location of Office of Administrative Procedure

The undersigned members of the Committee are unable to agree with the portion of Resolution No. 2 urging that the Office of Administrative Procedure (or Legal Services and Procedure) be established independently of other governmental departments. We believe that this office should be established within and under the jurisdiction of the Department of Justice. We take this position not only because of the greater ease with which the esential housekeeping arrangements can thereby be managed, but also for other reasons which seem compelling. Located in the Department of Justice, the Office of Administrative Procedure would possess authority and carry weight that it could not hope to enjoy as a small, independent agency. Moreover, within the Department of Justice it will be better protected from the petty, political interferences that are certain to arise and that would be likely to be more difficult to resist in the case of a small, independent agency. Finally, it has been borne out by experience that independent agencies tend to grow abnormally, and it is desirable to avoid creating another such bureaucratic organization. The fact that both the President's Conference on Administrative Procedure and the Hoover Commission, together with its Task Force, have recommended that the office be established within the Department of Justice, strengthens our conviction that this is the preferred procedure.

JOHN G. CLARKSON
GEORGE JACKSON EDER
HARRY H. FRANK
COURTS OULAHAN
E. BLYTHE STASON

COMMITTEE ON ORGANIZATION AND BY-LAWS

Recommendations for By-law Amendments

The Committee on Organization and By-laws submitted to the Council for consideration at the May 21, 1955, meeting resolutions providing for amendments to Sections 2, 4 and 5 of Article III of the By-laws of the Section. The Council approved the resolutions. They are submitted for Section action and submission to the House of Delegates as follows:

RESOLVED, That the Section of Administrative Law recommends that the House of Delegates adopt the following resolutions:

(1) Resolved, That Article III, Section 2, of the By-laws of the Section of Administrative Law be amended to read as follows:

Section 2. There shall be a Council, which shall consist of the Chairman, the last retiring Chairman, the Vice-Chairman, the Secretary, and the Section Delegate, all of whom shall be members ex officio, together with twelve other members to be elected by the Section as hereinafter provided.

(2) Resolved, That Article III, Section 4, of the By-laws of the Section of Administrative Law be amended to read as follows:

Section 4. Members of the Council shall be nominated and elected for a term of three years, provided, however, that two members nominated and elected at the annual meeting in 1955 shall serve for one year; two for two years; and two for three years; and provided further that members of the Council elected prior to the 1955 annual meeting, whose terms have not expired, shall remain members of the Council until expiration of the terms for which they were elected. Thereafter, upon the expiration of each of the terms set forth above, four members of the Council shall be elected at each annual meeting of the Section for terms of three years, beginning at the close of the annual meeting at which they shall have been elected, and ending at the close of the third succeeding annual meeting of the Section.

(3) Resolved, That Article III, Section 5, of the By-laws of the Section of Administrative Law be amended to read as follows:

Section 5. No person shall be eligible for election as a member of the Council if he is then an elected member of the Council and has been such member continuously for a period of three years or more.

Reasons for Recommendations

(1) The amendment to Section 2, Article III, proposes to increase the number of members-at-large of the Council from eight to twelve. (2) The amendment to Section 4, Article III, provides the manner in which the terms of twelve members will operate. (3) The purpose of the amendment to Section 5, Article III, is to further clarify that Section by describing the members-at-large as *elected* members. This clarification was thought necessary because a question had arisen as to the eligibility for election as a member-at-large of the Council of one whose term as an ex officio member was expiring.

Other Matters

At the meeting of the Council in Atlanta, Georgia, on March 6-7, 1954, a resolution was adopted to the effect that the Committee on Organization and By-laws present a comprehensive report on the organization of the Section, with appropriate recommendations as to changes, at the Midwinter meeting of the Council at least once every two years beginning in 1954. Since the term of officers of the Section is now for one year, the Committee believes such a report should be made at least once a year at the Midwinter meeting. On the recommendation of the Committee on Organization and By-laws, the Council, on

May 21, 1955, adopted the following resolution:

> RESOLVED, that the Committee on Organization and By-laws shall present a comprehensive report on the organization of the Section to the Council, with recommendations as to changes, if they are desirable, at the Midwinter meeting of the Council, every year beginning in 1956.

At the Midwinter meeting of the Council in 1954, it was also resolved that all instances in which Committees of the Section are abolished or new Committees of the Section established should be reported to the Commitee on Organization and By-laws, which Committee was directed to keep a record of the history of the organization of the Section. Pursuant to this resolution, the Committee on Organization and By-laws set up a card index system on which appear the names of all the Committees and a description of their functions. As Committees are changed and/or abolished, notations are made showing the dates of the action taken, and new cards are added when new Committees are formed.

In addition to the card index system, the Committee on Organization and By-laws is maintaining the following files:

(1) History of the Section. In this file the Committee plans to keep all of the documentary evidence of the history of the organization of the Section prior to the establishing of the card index system mentioned above.

(2) Reports of the Committee to the Section Chairmen.

(3) Minutes of the meetings of the Council and of the Section.

June 14, 1955.

Respectfully submitted,

COMMITTEE ON ORGANIZATION AND BY-LAWS

LOUISA WILSON,
Chairman

JESSE E. BASKETTE,
Vice-Chairman

COMMITTEE ON PUBLIC CONTRACTS

Prior to the last annual meeting the Committee reported and recommended (6 Ad. L. Bul. 248) the adoption of the following resolution:

> RESOLVED that the Section of Administrative Law recommends that the House of Delegates adopt the following resolutions:
>
> BE IT RESOLVED that it is the opinion of the American Bar Association that no Government contract should contain a Disputes-Appeals Clause making administrative appeal obligatory upon the contractor, but that such administrative appeal should be at the option of the contractor; and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.
>
> BE IT RESOLVED FURTHER that it is the opinion of the American Bar Association that administrative agencies having the power to decide disputes arising under Government contracts pur-

suant to the provisions of a Disputes-Appeals Clause contained in such contracts should have the power to subpoena witnesses and to administer oaths or take affirmations in lieu thereof in connection with hearings on or consideration of such disputes; and that the Section of Administrative Law be authorized and directed to advance appropriate legislation to that end.

These recommendations were considered by the Council and the Section at the annual meeting in Chicago in August of 1954. The Council and Section deferred final action on the report and suggested that the Committee reconsider it, and with reference to the recommendation as to optional appeals recast the report so as to emphasize that while the principle of the doctrine of exhaustion of administrative remedies and the burden it casts upon the parties is recognized there are special reasons for not applying it fully in the case of Government contract disputes.

Accordingly, the Committee has continued its study of the problems presented and for the reasons hereinafter set forth recommends the approval of the resolutions set forth above.

Virtually every Government contract contains a standard *Disputes* clause, which the Government requires to be included.

Pursuant to this clause all disputes concerning questions of fact arising under the contract which are not settled by agreement are to be decided by the contracting officer; but with the proviso that the contractor may appeal from such decision to the head of the department concerned within thirty days. The decision of the head of the department in such case is final, according to the language of the *Disputes* clause, though not so in practice, as this report will demonstrate.

The clause, as written, makes appeals to the head of the department concerned or his duly authorized representative by the contractor mandatory in practically every dispute, because questions of fact are usually involved even though the ultimate question in the case is one of law.

The pursuit of this administrative procedure by the contractor is regarded by the Courts as an "administrative remedy" which must be exhausted by the contractor before he can institute suit under the Tucker Act. *Silas Mason* v. *United States*, 90 C. Cls. 266; *United States* v. *Joseph A. Holpuch Co.*, 328 U. S. 234, 66 S. Ct. 1000, 90 L. Ed. 1192.

While the principle of exhaustion of administrative remedies is fixed in the law, and works successfully in many government contract cases, there are categories of disputes in the government contract field for which no administrative remedy is in fact available.

One area in which no administrative remedy is available is in cases in which the dispute concerns claims for unliquidated damages for breach of contract by the Government. In these cases the Appeals Boards, the Court of Claims and the Comptroller General have held that neither the contracting officer nor the head of the department has any jurisdiction to award damages against the Government. *Samuel Plato* v. *United States,* 86 C. Cl. 665; *Phoenix Bridge Co.* v. *United States,* 85 C. Cl. 603; 20 Comp. Gen. (1941) 573, 579; *Mc-*

Loughlin, Inc. v. *Department of Interior Board of Contract Appeals,* dec. 1/18/55, 6 CCF 61627.

Nevertheless, because "Law is law, and fact is fact, and never the twain shall meet, but which is which and what is what escapes e'en laws elite," the contractor is obliged, to avoid possibility of mistake and failure to exhaust his administrative remedy, to appeal every such dispute, only to have the Board finally say in many cases that it has no jurisdiction. *McLaughlin, Inc., supra.*

The same problem exists in cases involving a relationship between a claim outside the contract and a contractual provision clearly involving a dispute as to a question of fact. An example of this type of case may be found in the situation where the contracting officer has assessed liquidated damages for delay and the contractor contends that the delays were beyond his control and without his fault or negligence, were due to a breach of the contract by the Government and asserts a claim for unliquidated damages against the Government. The question as to whether or not the delay was due to the contractor's fault or negligence is a factual question within the contract. Therefore, the contractor must appeal the contracting officer's deduction of liquidated damages. At the same time he has his own claim for unliquidated damages against the Government for the delay. He cannot assert this claim to the contracting officer because the contracting officer has no authority to consider it. Nor can he assert it on appeal as the Board has no jurisdiction. On the other hand, because of the relationship between the two claims, prudence dictates that the contractor await the Board's decision on his claim for remission of liquidated damages before instituting suit on his claim for unliquidated damages, an action which both parties know is going to be taken in any event. This subjects both the contractor and the United States to the expense of an unnecessary administrative adjudicatory proceeding, and subjects the contractor to serious delays in securing his day in court.

In addition to the unliquidated damage cases over which the Appeals Boards have no jurisdiction, the Court of Claims has held that the decision of the head of the department or an Appeals Board on a question of law, or mixed question of law and fact, is not final. *Palace Corporation* v. *United States,* 124 C. Cl. 545, cert. den. 346 U. S. 815. *Allied Contractors* v. *United States,* 129 C. Cl. 400. In such cases the Appeals Boards can and frequently do decide questions of law but unless the parties are willing to be bound thereby no finality attaches to such a decision. In other words, if the decision on the law is in the contractor's favor he may, nevertheless, have to sue on the decision, and if the decision is adverse to the contractor he may go on to the courts in any event.

This leaves for consideration the cases in which the question involved is one of fact only, of which there are not too many, because most cases require the application of principles or rules of law to the determined facts. This brings us to a consideration of the so-called *Wunderlich* legislation, Pub-

lic Law 356, 83rd Congress, 2nd Session, Title 41 U. S. C. A. Sec. 321.

Prior to the decision of the Supreme Court in the *Wunderlich* case the rule favored by the Court of Claims was that the decision of the contracting officer or the head of the department on a question of fact was not final if it was fraudulent, capricious, arbitrary, or so grossly erroneous as to imply bad faith. In the *Wunderlich* case, however, the Supreme Court held that such decisions were final unless the contracting officer was guilty of actual fraud, i.e., conscious wrongdoing or an intention to cheat or to be dishonest. Having come to this conclusion, which upset the long line of past cases in the Court of Claims, the Supreme Court invited Congress to legislate on the matter. Congress' answer was Public Law 356, *supra.*

This law forbids any Government agency placing in any contract a provision permitting the contracting officer to make final decisions on questions of *law.* It also provides that the decisions of the contracting officer or head of the department shall be final on questions of *fact* only if such decisions are not arbitrary, capricious, fraudulent, or so grossly erroneous as to imply bad faith, and then only if supported by substantial evidence.

Thus, by the action of the Congress finality can no longer attach to a decision on a question of fact rendered by an Appeals Board in the course of the contractor's pursuit of an administrative remedy. The indication, incidentally, from recently decided cases in the Court of Claims is that the Court, in order to pass upon the finality to be given the administrative decision on a question of fact, will hear additional evidence not considered administratively. *Wagner Whirler Derrick Corp.* v. *United States,* 128 C. Cl. 382, 121 Fed. Supp. 664; *Williams* v. *United States,* ..... C. Cl. ....., 127 Fed. Supp. 617, cert. den. ..... U. S. .....; *General Casualty Company* v. *United States,* ..... C. Cl. ....., 127 Fed. Supp. 805, cert. den. ..... U. S. ..... Therefore, even a "final" decision of the head of the department or his designated Appeals Board is subject to being upset by the application of the standards of Public Law 356, i.e., arbitrariness, capriciousness, fraud, bad faith, lack of substantial evidence, as well as being overcome by additional evidence offered in the courts. This observation would apply equally to a decision wholly adverse to the contractor as to one in his favor in which he felt he was not getting full justice.

We have been considering up to now cases involving only single appeals. The problems referred to multiply when more than one administrative appeal is required to be taken, as in the case of Corps of Engineers contracts for military construction. In those contracts an appeal must first be taken to the Chief of Engineers and then, upon dissatisfaction by the contractor with the results of that appeal, another appeal to the head of the department must be taken. If the case is one of those discussed above the contractor has had to bear the very substantial expense of two appeals and loss of time without hope of administrative relief. The same can be said of all other cases involving either questions of law, of mixed law and fact, or of fact only, where failure to secure administrative re-

lief sends the case to court and a trial de novo with a repetition of the expense incurred in fruitless pursuit of the "administrative remedy."

Unquestionably there are many cases of contract dispute in which a satisfactory administrative remedy has been and will be available. But there are equally as many cases which do not lend themselves to the so-called administrative remedy. Claims for unliquidated damages, for example; claims where the dispute involves questions of law which Congress has removed from the jurisdiction of the contracting officer by Public Law 356; and claims and disputes involving mixed questions of law and fact, or pure fact, none of which are final, unless, perchance, the contractor has received an administrative decision which he and the Government find satisfactory.

But, even if the contractor finds the decision satisfactory, the Board has no power to enforce it. In many cases it can only send the case back to the contracting officer for settlement but cannot order or compel a settlement. If a satisfactory settlement figure cannot be reached with the contracting officer then another appeal must be initiated on that dispute. But, still worse, if the contracting officer simply refuses, upon one excuse or another or without any excuse at all, to conduct settlement discussions, both the contractor and the Appeals Board are powerless. Then, all the contractor can do is file suit in the Court of Claims and hope the Court will agree with him that he went as far as possible in exhausting his administrative remedy.

Still further, if the contracting officer or the disbursing officer of his agency disagrees with the decision of the Appeals Board, they may refer the decision to the Comptroller General for review. If the Comptroller General disagrees with the Board, as he may (see House Report No. 1380, 83rd Congress, 2nd Session, p. 7, which accompanied Public Law 356), the contractor has to sue the United States under the Tucker Act. Nothing, therefore, has been accomplished by the contractor in his pursuit of the administrative remedy. He is in court where he would have been in the first place, had he the option sought by the appended legislation. By this time, after several years of administrative proceedings the case is stale, witnesses are no longer available, or, if available, they cannot recall important facts.

This Committee has no quarrel with the doctrine of exhaustion of administrative remedies in the field of administrative law. However, the pursuit of administrative remedies in government contract cases is fraught with the limitations and difficulties outlined above.

In addition, administrative remedies are generally designed to expedite the settlement of the controversy. The government contract *Disputes* provision does just the reverse. The contractor may be required, in exhausting his administrative remedy, to resort to at least two and probably three abortive administrative proceedings before he may seek relief in the court, under the existing *Disputes* provision, and then be faced with an additional trial de novo.

It is not the thought of this Committee to deprive contractors of the right to appeal from contracting officers' decisions to the appropriate Board of Contract Appeals. The Committee is informed that there are many cases in which contractors welcome the opportunity to obtain administrative review of contracting officers' decisions. Were it possible to draw a line between those cases where administrative appeal is appropriate and those where it is ineffective, unduly burdensome and expensive, your Committee would do so. However, no standard exists for drawing of such a line.

Therefore, it is your Committee's view that the only solution to this problem is that of making the administrative appeal optional. Contractors who wish to do so should be permitted to appeal to the secretary or head of the department concerned or his duly authorized representatives. Contractors who are convinced that because of lack of jurisdiction or stare decisis an administrative appeal in their case would be futile should be permitted to have their day in court without delay. The very fact that contractors would have the option to seek or not seek administrative review of contracting officers' decisions should have a salutary effect upon the work of Boards of Contract Appeals. It could make them more conscious of their obligations as impartial quasi-judicial agencies and tend to improve the quality of and expedite their work. It may even be that the adoption of such legislation would persuade the heads of the various departments concerned to adopt a uniform practice, which some agencies now follow, of training contracting officers for the difficult tasks which are assigned to them in making the initial decisions. Many Government contracting officers are military officers whose qualifications consist solely of an occasional tour of duty as a contracting officer without any other training.

Your Committee has been seriously disturbed by reports that many contractors have lost their contractual claims against the Government by reason of failure to appeal within the 30-day period. This 30-day period, it has been suggested to your Committee, is the shortest statute of limitations known to the law. Your Committee is also of the view that if contractors are to be given an option to appeal administratively or to institute proceedings in the courts, they should be required to make an early election so that the department concerned may, if the contractor elects to sue, proceed to review the decision of the contracting officer so as to determine whether or not the contractor's action should be contested and to what extent. For these reasons the Committee in suggesting legislation has increased the appeal period from 30 days to 60 days and has specified that the election must be made within the same period of time.

Submitted with this report as Appendix A and made a part hereof is a proposed bill which the Committee suggests will accomplish the purposes of the first resolution recommended for adoption.

Also submitted herewith as Appendix B and made a part hereof is a proposed bill which the Committee suggests will accomplish the purposes of the second resolution which, for the reasons set forth in the re-

port filed last year, is also recommended for adoption.

June 1955.

Respectfully submitted,

COMMITTEE ON PUBLIC CONTRACTS

ROBERT SHERIFFS MOSS
Chairman

BERNARD J. GALLAGHER
Vice-Chairman

Appendix A

A BILL

To expedite the ultimate settlement of complex disputes arising under Government contracts by providing for the elimination of multiple administrative decisions and authorizing the waiver of administrative reconsideration of administrative decisions upon an election to seek a judicial determination.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That notwithstanding the provisions of any Government contract with respect to the administrative determination of disputes, a contractor may, upon receipt of an unsatisfactory decision from the contracting officer or his duly authorized representative, elect to file a written appeal within 60 days to the appellate authority named in the contract, or elect to file suit in the United States Court of Claims or in a United States District Court as prescribed by law, which courts are granted jurisdiction, after *de novo* consideration of all the facts presented in connection with such dispute, to enter judgment against the United States according to law; *provided,* that written notice of such election shall be given by the contractor to the appellate authority named in the contract within 60 days after the receipt of said unsatisfactory decision; and *provided further,* that where the election is made to seek relief from the appellate authority named in the contract, the rights of all parties shall continue as they presently exist under Public Law 356, 83rd Congress, 2nd Session.

Appendix B

A BILL

To provide for the issuance of subpoenas, for the taking of testimony and the administration of oaths or affirmations in Government contract claims or disputes cases.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any head of a department or bureau before whom a claim or dispute arising under a valid existing contract with the United States is properly pending, shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to such claim or dispute, before the head of such department or bureau or his duly authorized representative or board conducting a hearing on such claim or dispute. Any representative of such head of such department or bureau or any member of a board designated by the head of such department or bureau to hear and to report

on, or to hear and decide such claim or dispute, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any territory or possession thereof, at any designated place of hearing.

Section 2. In case of contumacy or refusal to obey a subpoena issued to any person, any District Court of the United States or the United States Courts of any territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the head of such department or bureau, shall have jurisdiction to issue to such person an order requiring such person to appear before the head of such department or bureau or his duly authorized representative or board designated to hear and to report on, or to hear and decide, such claim or dispute and there to produce evidence if so ordered, or to give testimony touching the claim or dispute under consideration or in question; and any failure to obey such order of the Court may be punished by said Court as a contempt thereof.

Section 3. No person shall be excused from attending or testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the head of such department or bureau, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

Section 4. Subpoenas may be issued by the head of such department or bureau, or, in the case of a representative or board regularly established in the office of the head of such department or bureau for the purpose of hearing and reporting on, or hearing and deciding, such claims or disputes, by such representative or by any member of such board to whom the authority so to do has been delegated by the head of the department or bureau concerned. Such subpoenas may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid, shall be proof of the service of the same. Witnesses summoned before the head of such department or bureau or any duly authorized representative or board thereof, shall be paid the same fees and mileage that are paid witnesses in the Courts of the United

States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the Courts of the United States.

Section 5. All process of any Court to which application may be made under Section 2 hereof, may be served in the judicial district wherein the witness required to be served resides or may be found.

COMMITTEE ON STATE ADMINISTRATIVE LAW

The Committee on State Administrative Law has been reconstituted with a vice chairman for each judicial circuit, and active members in most of the states. This has served to provide an efficient means for making comparative studies. When information is needed as to how a particular problem is handled in the several states, it is possible to obtain the answers with reasonable dispatch by flashing an inquiry through the vice chairmen to the state representatives, all of whom have broad experience in the administrative practices in their respective jurisdictions.

During the last year, this Committee has functioned in this way to advise the Committee on Judicial Review of decisions of state courts bearing significantly on questions as to scope and availability of judicial review. Reports of all such decisions coming to the attention of the Committee members have been prepared and forwarded to the Committee on Judicial Review.

A start has also been made on a study of state statutes providing for legislative review of administrative rules. In Connecticut (Sec. 285, Gen. Stat.), Michigan (Sec. 3.560-14, Mich. Stat. Ann.), and Nebraska (Sec. 84-901, Rev. Stat.) provision is made for filing of rules and regulations adopted by state agencies with the state legislature. The statutes contemplate reference of such rules to appropriate legislative committees (either as a matter of course or upon request) for the holding of public hearings. If, after hearing criticism of the rule, the legislature disapproves it, the rule is voided. The Nebraska statute is recent, but during the last decade the Connecticut and Michigan statutes have furnished an interesting history, which is the subject of a continuing study by this Committee.

Respectfully submitted,

COMMITTEE ON STATE ADMINISTRATIVE LAW

FRANK E. COOPER
Chairman